TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST No. 1523, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1937.

CERTIORARI GRANTED MARCH 29, 1937.

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INDEX.

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	2
Exhibit A—Deficiency letter of January 3, 1934	5
Statement	6
Answer	7
Statement of evidence	8
Caption	8
Offers in evidence:	
Deposition of J. F. Buys	9
Deposition of Albert A. Lewis	10
Order settling statement of evidence	12
Petitioner's Exhibit No. 1—Declaration of Trust dated December 12, 1925, known as Trust No. 1523	12
Agreement dated December 12, 1925, between Minerva S. Melidones, Albert A. Lewis and Chicago Trust Co.	17
Agreement dated December 12, 1925, between Minerva S. Melidones, Albert A. Lewis and Chicago Trust Co.	34

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Page

Proceedings before United States Board of Tax Appeals—Continued
Memorandum opinion, Arundell, M. 36
Decision 38
Notice of petition for review 39
Petition for review 40
Orders enlarging time for preparation of evidence and for delivery of record to U. S. Circuit Court of Appeals 44
Præcipe for record 45
Certificates of clerks 46
Proceedings in U. S. C. C. A., Seventh Circuit 49
Caption 49
Appearances of counsel 49
Judgment 53
Clerk's certificate 55
Order allowing certiorari 55

1 A. A. Lewis and Company, Main and Lincoln Ave. Subdivision, Trust #1523; Central Republic Bank and Trust Company, as Successor Trustee by Consolidation,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 75010

Appearances:

For Taxpayer: Raymond A. Duggan, Franz W. Castle, Esq.

For Commissioner: B. M. Coon, Esq., John W. Smith, Esq.

DOCKET ENTRIES.

1934

Mar. 5—Petition received and filed. Taxpayer notified. (Fee paid).

Mar. 5—Copy of petition served on General Counsel.

Apr. 11—Answer filed by General Counsel.

Apr. 21—Copy of answer served on taxpayer.

May 11—Motion to place on Day Calendar week of 6/18/34 filed by taxpayer. 5-14-34 Denied.

Aug. 22—Hearing set Oct. 2, 1934.

Sept. 24—Depositions of James F. Buys filed (1).

Sept. 24—Depositions of A. A. Lewis filed (1).

Oct. 2—Hearing had before Mr. Arundell—Div. 7 on merits. Depositions of Buys and Lewis admitted in evidence, appearance of Franz W. Castle, Esq., pet's brief due 11/2/34. Commissioner's brief Nov. 17-34. Pet's reply Nov. 27-34.

Oct. 12—Transcript of hearing Oct. 2-34 filed.

Nov. 1—Brief and statement of facts filed by taxpayer. 11/2/34 copy served.

Nov. 15—Brief filed by General Counsel.

Dec. 10—Order extending time to Dec. 20-1934 to file petitioner's reply brief, entered.

Dec. 12—Reply brief filed by taxpayer. 12/12/34 copy served.

1935

June 14—Memorandum Opinion rendered—Mr. Arundell.

—Div. 7. Decision will be entered under Rule 50.
July 1—Notice of settlement filed by General Counsel.
July 3—Hearing set July 24-35 on settlement.
July 15—Consent to settlement filed by taxpayer.
July 18—Decision entered—Mr. Arundell, Div. 7.
Oct. 14—Petition for review by United States Circuit Court of Appeals, 7th Circuit, with assignments of error filed by General Counsel.
Oct. 18—Proof of service filed.
2 Dec. 4—Motion for extension to 4/1/36 to complete and transmit record filed by General Counsel.
Dec. 4—Order enlarging time to April 1-36 to prepare and deliver record, entered.

1936

Mar. 24—Motion for extension of time to June 1, 1936 to transmit and complete record, filed by General Counsel.
Mar. 24—Order enlarging time to 6-1-36 for preparation and delivery of record, entered.
May 25—Motion for extension to 8/1/36 to prepare and transmit record, filed by General Counsel.
May 25—Order enlarging time to 8/1/36 to prepare and deliver record, entered.
June 26—Agreed statement of evidence lodged.
June 26—Praecipe with proof of service thereon filed.
July 11—Agreed statement of evidence approved and ordered filed.

1934. 3 UNITED STATES BOARD OF TAX APPEALS.

A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust #1523, Central Republic Trust Company, formerly named Central Republic Bank and Trust Company, as Successor Trustee by Consolidation,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 75010

PETITION.

Filed Mar. 5, 1934.

The above named petitioner hereby petitions for a redeter-

mination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, dated January 3, 1934, IT:AR:B-4, and as a basis for this proceeding alleges as follows:

1. The petitioner is successor trustee to the Chicago Trust Company under its Trust No. 1523; with its principal office at 203 South La Salle Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on January 3, 1934.

3. The taxes in controversy are income taxes for the year 1931, amounting to $512.30.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Classification of this trust as an association for income tax purposes.

(b) Use of an improper accounting method to reflect taxable income.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) An interpretation of the Trust & Selling Agreement dated December 12, 1925, governing the creation and continuation of this Trust will show that it is a pure security trust, not doing business in quasi-corporate form, and with only one residuary beneficiary who owned the property and received the net proceeds after payment of selling commissions to the named selling agent.

(b) The individual let cost recovery basis of accounting followed by the Commissioner in determining taxable income for 1931 and prior years is improper and erroneous. The deduction of commissions paid the selling agent from invested cost of each lot (as a receipt) and also as a deductible selling expense results in a distortion of taxable income and/or losses in the first years of selling operations. The large losses resulting in the years in which sales were made cannot be carried forward long enough, for income tax purposes, to be absorbed by subsequent receipts. A fictitious taxable profit, on an overall basis and particularly for 1931, is thus pro-

4 duced, with resulting injustice to the taxpayer. An individual lot cost recovery basis in which net receipts to the trust (segregating selling agent's share as his separate property, as directly provided for in the Trust & Selling Agreement) are applied against individual lot costs should be followed in determining true taxable income. This pro-

cedure can be consistently and uniformly followed in all years and particularly in the year 1931 now in controversy.

Wherefore the petitioners pray that this Board may hear the proceeding and determine that this subdivision trust is not taxable as an association, but only as a security trust the net income of which goes to the sole residuary beneficiary; and that a proper individual lot cost recovery basis of accounting for profits from lot sales be used by the Commissioner; and that such other relief be granted as seems proper and just under the circumstances, including the rescinding of the deficiency assessment hereinbefore indicated.

RAYMOND A. DUGGAN,
Counsel for Petitioners,
221 North La Salle St.,
Chicago, Illinois.

State of Illinois }
County of Cook } ss.

O. C. BARTON, being duly sworn, says that he is Assistant Secretary of Central Republic Trust Company, formerly named Central Republic Bank and Trust Company, a corporation, successor trustee to Chicago Trust Company under Trust No. 1523 by consolidation; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statement contained therein; and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

O. C. BARTON.

Subscribed and sworn to before me this Second day of March, A. D., 1934.

L. P. BIEBESHEIMER,
Notary Public.

(Seal)

5 "EXHIBIT A".

(Copy)

622M NP-2-1 act

TREASURY DEPARTMENT
Washington

Jan. 3, 1934.

A. A. Lewis and Company
Main and Lincoln Avenue Subdivision Trust #1523,
c/o Central Republic Bank and Trust Company, Trustee,
208 South La Salle Street,
Chicago, Illinois.

Sirs:

You are advised that the determination of your income tax liability for the years 1931 discloses a deficiency of $512.30 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your returns, by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; Whereas If This Form Is Not Filed, interest at the rate of 6% per annum will accumulate.

Respectfully,
(Signed) GUY T. HELVERING,
Commissioner.
By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Form 870
Statement

5½ Statement.

IT:AR:D-4
GDK-60D

In re: A. A. Lewis and Company,
Main and Lincoln Avenue Subdivision Trust #1523,
c/o Central Republic Bank and Trust Company, Trustee,
208 South La Salle Street,
Chicago, Illinois.

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1931	$512.30	None	$512.30

Reference is made to office letter dated November 20, 1933, advising you of the approval of the report submitted by the internal revenue agent in charge at Chicago, Illinois, a copy of which was transmitted to you under date of September 19, 1933.

Records of the Bureau do not indicate that a reply has been received to the above-mentioned letter, and, therefore, since you do not desire to waive your right to the final notice of deficiency, this final notice is issued at this time.

Further reference is made to the report of the internal revenue agent in charge at Chicago, Illinois covering the calendar year 1931, and to your protest submitted to that official under date of October 4, 1933.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference held with your representative in the office of the agent in charge. The adjustments recommended by the agent as a result of the conference have been approved by this office.

Your contention that the revenue agent was in error in recommending a deficiency of $512.30 for the year 1931, based upon a net income of $7,269.17, since due to the large number of unsold lots the venture as a whole would result in no profit and that the stockholders would not receive back the capital invested, has been denied for the following reasons:

Based upon the evidence in file, your organization has been held to be an association taxable as a corporation instead of a common law trust, the income of which is taxable to the beneficiaries, since the beneficiaries of your organization have the management and control of the trust property and the activi-

ties of the trustee are not restricted to the collection of income and the distribution of the same to the beneficiaries of the trust. The "cost recovery" basis was used in computing the profit on the sale of lots, which method has been consistently used for the years 1926 to 1930, inclusive. While your contention in regard to the venture being a failure and that the stockholders would not receive back the capital invested is probably true, the profit realized on the sale of individual lots must be reported at the time realized regardless of the final outcome of the entire venture. This is in accordance with article 61, Regulations 74.

6 Net income as disclosed by return filed on form 1041 — None

Add:	
Profit on lots sold	$ 7,269.17
Corrected net income	$7,269.17
Less:	
Exemption	3,000.00
Balance subject to tax at 12%	$4,269.17
Amount of tax at 12%	$ 512.30
Tax previously assessed	None
Additional Tax to be assessed	$ 512.30

7 UNITED STATES BOARD OF TAX APPEALS.

(Caption—75010)

ANSWER.

Filed Apr. 11, 1934.

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of petition.

2. Admits the allegations contained in paragraph 2 of petition.

3. Admits that the taxes are income taxes for the year 1931, but denies that the amount in controversy is $512.30.

4. Denies that the respondent erred in the manner alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. Denies the allegations of fact contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
PAUL D. PAGE, JR.,
Special Attorney, Bureau of Internal Revenue.

ikc 4-9-34

19 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,* *vs.* A. A. Lewis & Co., Main & Lincoln Avenues Subdivision Trust No. 1523, Central Republic Trust Company, formerly named Central Republic Bank and Trust Company as successor Trustee by consolidation, *Respondent.*	BTA Docket No. 75010.

STATEMENT OF EVIDENCE.

Filed June 26, 1936.

Filed July 11, 1936.

The following is a statement of the evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable C. Rogers Arundell, Member of the United States Board of Tax Appeals on October 2, 1934. Franz W. Castle appeared for the petitioner and Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

Counsel for petitioner offered in evidence in behalf of the petitioner the deposition of J. F. BUYS, taken in due form,

in Chicago, Illinois, on September 19, 1934. There being no objection by respondent the same was received by the Board and filed as evidence in the case.

Therein the witness' testimony is as follows:

Direct Examination by Franz W. Castle.

I am employed by the Central Republic Trust Company in charge of the operation of the subdivision trusts. For a number of years last past I have been conversant with the handling of Trust No. 1523 in the said company. The document which you now show me is the declaration of trust and trust agreement in Trust No. 1523. So far as our records show there was no amended or supplemental trust in connection with this trust. The papers about which I have testified are a part of our files in that trust. (Dep. 2.)

Thereupon the petitioner offered in evidence the said declaration of trust dated December 12, 1925, known as Trust No. 1523, marked PETITIONER'S EXHIBIT NO. 1, and the same was admitted in evidence and attached to the deposition, in words and figures following: (Insert)

The Central Republic Trust Company is the successor to the Chicago Trust Company and is now acting as successor to this trust by virtue of the consolidation. I was not connected with the Chicago Trust Company when this trust was created. I became connected with that company February 28, 1926, and from that date down to the present time I have been conversant with the handling of this trust. The trustee and its successor since the formation of the trust have collected the funds due from the contract purchasers and paid the commissions as called for in the trust agreement, and distributed funds to the beneficiaries. Yes, the trustees made collections under the contracts. It paid the commission to the sales agent as called for in the agreement and it held the balance of the funds for the benefit of the beneficiary.

At the inception of this trust there was one beneficiary, Minerva Melidones. Yes, there has been a change of beneficial ownership by assignment by Minerva Melidones to Benjamin Schwartz of her beneficial interest in the trust. The estate of Mr. Schwartz is the sole beneficiary. The records do not show that there has been at any time any other beneficiary than those which I testified to.

The Chicago Trust Company and its successor the Central Republic Trust Co. in connection with the sale of the property

mentioned in the trust agreement had no duties in connection with the sale of the property except to collect on contracts submitted to us by A. A. Lewis for collection.

Prior to the submission of the contracts for the sale of
21 lots, we did not check the purchasers of the lots. The only check made was to see that the minimum sales price was in accordance with the trust agreement and that the contracts were in accordance with the trust agreement. I did not, to my knowledge, perform any duties than those shown in the trust agreement.

Mr. Perkins: No cross examination. (Dep. 4.)

It was agreed between counsel that a certified copy of the trust and sales agreement, without a plat, might be substituted for the original copy and be marked as Petitioner's Exhibit No. 1.

Thereupon, counsel for the petitioner offered in evidence on behalf of the petitioner the deposition of ALBERT A. LEWIS, taken in due form in Chicago, Illinois, on September 19, 1934, which, in the absence of objection by respondent, was received by the Board and filed as evidence in the case.

The deponent testified as follows:

Direct Examination by Mr. Franz W. Castle.

My name is ALBERT A. LEWIS. I have been engaged in the real estate business for 15 years; subdivision and land. I have operated during the last ten years chiefly in the city of Chicago and suburbs, particularly, Niles Center. As a subdivider I maintained an organization. After 1925 I handled about 35 different subdivisions. I handled a subdivision in Niles Center in which the name Melidones was mentioned. I am not sure whether it was Minerva or her husband, who, I understand, died. (Dep. 7.)

(Counsel requested witness to examine the trust agreement and state whether or not he was the A. A. Lewis mentioned therein.)

Witness states that the document appeared to be a trust agreement to which his name appeared as a party. As I
22 remember my interest in that trust was a sales agency contract. I mean we had a contract to sell the property and receive from the proceeds of the sale a commission therefor. I remember the people who originally owned the property but I can't recall their names. There were several peo-

ple who owned it. The purpose of putting title in the Chicago Trust Company as trustee was so that the title to the property would remain in a neutral person and be vested with the trustee so that contract purchasers who purchased the various lots out of the subdivision would be able to look to the trustee upon the completion of their payments for the purchase of the various lots for the title to the lots which they purchased. In my experiences as a subdivider practically all of that method was usually adopted for carrying the title during the tenancy of the trust. Practically all the subdivisions in Niles Center were placed in trust with trust companies. The chief reason, generally speaking, for that method of carrying the title was that the purchasers of individual lots can eventually secure their title. There may be other reasons however. (Dep. 8.)

No, I do not remember what the amount of my commission was in this particular subdivision. (Petitioner's counsel handed Exhibit No. 1 to the witness and requested him to examine it, which he did.) Well this recites a commission of 33⅓% but it may not have actually been that much because 33⅓% was payable only, if, as, and when actual collections were made.

No, I don't think we had any other interest in that trust except as selling agent under the trust agreement, Exhibit No. 1. Personally I did not as sales agent sell any of the lots in this trust. Yes, through my organization. The purchasers were procured by various methods, one of which might be through advertising and securing of inquiries, and through salesmen. The qualification of purchasers were their
23 ability to make the necessary initial payment. An office of the Company decided that at the time. No, the Chicago Trust Company had nothing to do with the selection of purchasers or their eligibility. No, the beneficiaries of the trust did not have anything to do with the selection or eligibility of lot purchasers except that a lot could not be sold unless it was stated in the purchase contract that a given percentage of the purchase price was paid. The contract with individual lot purchasers were turned over to the trustee for collection. I do not know that they raised any question as to the financial standing or eligibility of any contract purchaser.

No Cross-Examination. (Dep. 9-10.)

After the reading of the deposition, counsel for petitioner reoffered the above described Petitioner's Exhibit No. 1,

which, in the absence of objection from respondent, was admitted in the record.

Both sides thereupon rested, and the Board declared the record closed.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Herman Oliphant, General Counsel for the Department of the Treasury, as attorney for the Commissioner of Internal Revenue.

(Signed) HERMAN OLIPHANT
Herman Oliphant,
General Counsel for the Department of the Treasury, Attorney for Petitioner on Review.

24 The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

(Sgd) WM. C. O'CONNELL,
Receiver.
(Sgd) FRANZ W. CASTLE,
Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 11th day of July, 1936.

(S) C. ROGERS ARUNDELL,
Member, United States Board of Tax Appeals.

DMC/mer 3-4-36.

25 (Stamp) Received Sep 24 1934 U. S. Board of Tax Appeals.

PETITIONER'S EXHIBIT 1.

We Hereby Certify that the attached three documents are true and correct copies of the following described instruments, to-wit: Declaration of Trust dated December 12, 1925, numbered 1523, executed by Chicago Trust Company, as Trustee, and by Minerva S. Melidones and A. A. Lewis; Agreement dated December 12, 1925, made and entered into by Minerva S. Melidones, Albert A. Lewis and Chicago Trust Company, as Trustee under the provisions of said trust agree-

ment dated December 12, 1925, and known as Trust No. 1523, without copies of exhibits referred to in said agreement; Agreement dated December 12, 1925, by and between Minerva S. Melidones, Albert A. Lewis and Chicago Trust Company, as Trustee, under said trust, amending the aforesaid agreement dated December 12, 1925.

Dated September 20th, 1934.

CENTRAL REPUBLIC TRUST COMPANY,
By C. V. BARTON,
Assistant Secretary.

26 DECLARATION OF TRUST.

This Trust Agreement, dated this 12th day of December, 1925, and known as Trust Number 1523, is to certify that the Chicago Trust Company, an Illinois banking corporation, as Trustee hereunder, is about to take title to the following described real estate in Cook County, Illinois, to wit:

Lots One (1) to One Hundred Eight (108) inclusive, in Main Street and Lincoln Avenue Subdivision of Lots Seventeen (17) and Eighteen (18) and of part of Lot Nineteen (19) in Owner's Subdivision of the West half of Section Twenty-one (21), Township Forty-one (41) North, Range Thirteen (13), East of the Third Principal Meridian;

Also

A strip of land one rod in width lying East of and adjoining the West 820.2 feet of the South Forty (40) rods of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section Twenty-one (21) aforesaid, conveyed to the Village of Niles Center by deed dated November 26, 1892, and recorded December 9, 1903, as Document 3477596, in Book 8378, page 462, and that when it has taken the title thereto, or to any other real estate deeded to it as Trustee hereunder, it will hold it and the proceeds, profits, and avails thereof, if any, which may come to its hands by direction of the beneficiary or beneficiaries or by the specific terms hereof, in trust for the ultimate use and benefit of the following named persons according to the respective interests herein set out, to wit:

Minerva S. Melidones, and
A. A. Lewis, as shown by the attached agreement.

It Is Agreed and Understood between the parties hereto, and by any person or persons who may become entitled to

any interest under this trust, that the interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title to said property and the right to receive the proceeds from rentals or from sales of said premises, and that such right in the avails of said property shall be deemed to be personal property, and may be assigned and transferred as such; that in case of the death of any beneficiary hereunder during the existence of this trust, his or her right and interest hereunder shall, except as herein otherwise specifically provided, pass to his or her executor or administrator, and not to his or her heirs at law; and that no beneficiary now has, and that no beneficiary hereunder at any time shall have, any right, title or interest in or to any portion of said real estate as such, but only an interest in the proceeds as aforesaid; it being the intention of this instrument to vest the full legal and equitable title to said premises in said Trustee. No assignment of an interest hereunder shall be binding on the Trustee until the original or a duplicate copy of the assignment, in such form as the Trustee may approve, is lodged with it.

Certificates evidencing the interests of the beneficiaries
27 may be issued by the Trustee in such form as it may approve, in which event, an assignment of an interest shall be valid only upon the surrender therewith of such certificate, and the assignee shall not be entitled to recognition as a beneficiary hereunder until he has so surrendered such original certificate to the Trustee with a proper assignment and until a new certificate has been issued to him.

In case said Trustee shall make any advances of money hereunder on account of this trust or shall be made a party to any litigation on account of holding title to said real estate or in connection with this trust, or in case said Chicago Trust Company, either personally or as trustee, shall be compelled to pay any sum of money on account of this trust, or any property thereof, whether on account of breach of contract, injury to person or property, fines or penalties under any law or otherwise, the beneficiaries hereunder do hereby jointly and severally agree as follows: (1) that they will forthwith on demand pay the said Trustee, with interest thereon at the rate of 7% per annum all such disbursements or advances or payments made by said Trustee, together with its expenses, including reasonable attorney fees; (2) that the said Trustee shall be under no duty to convey or otherwise deal with any property or funds at any time held hereunder

until all of said disbursements, payments, advances and expenses made or incurred by said Trustee shall have been fully paid, together with 7% interest thereon as aforesaid; (3) that in case of nonpayment within sixty days after demand said Trustee may sell sufficient property to pay the debt and hand over any surplus to the beneficiaries. However, nothing herein contained shall be construed as requiring the Trustee to prosecute or defend any legal proceedings involving this trust or any interest thereunder unless it shall be furnished with funds sufficient therefor or be satisfactorily indemnified in respect thereto.

It shall not be the duty of the purchaser of any part of said premises to see to the application of the purchase money paid therefor; nor shall any one who may deal with said Trustee be privileged or required to inquire into the necessity or expediency of any act of said Trustee or of the provisions of this instrument.

This trust agreement shall not be placed on record in the Recorder's Office of the county in which the land is situated, or elsewhere, and the recording of the same shall not be considered as notice of the rights of any person hereunder, derogatory to the title of said Trustee.

While the Chicago Trust Company is the sole owner of the real estate referred to herein, and, so far as the public is concerned, has full power to deal with it, it is understood and agreed by the parties hereto and by any person who may hereafter become a party hereto, that said Chicago Trust Company will deal with it only when authorized to do so, in writing, and that it will, on the written direction of

In accordance with the attached agreement.

or on the written direction of such person or persons as may be beneficiary or beneficiaries at the time, make contracts for the sale of, make deeds for, or otherwise deal with the title of said real estate, provided, however, that the Trustee shall not be required without its consent to enter into any personal obligation or liability in dealing with said land or to make itself liable for any damages, costs, expenses, fines or penalties, or to deal with the title so long as any money is due to it hereunder. Otherwise, the Trustee shall not be required to inquire into the propriety of such direction.

28 The beneficiary or beneficiaries hereunder shall have the management and control of said property, and of the selling, renting and handling thereof, and any beneficiary or his agent, shall handle the rents thereof and the

proceeds of any sales of said property, except as herein otherwise expressly provided, and said Trustee shall not be called upon to do anything in the management or control of said property, payment of taxes, assessments, insurance, litigation or otherwise, except on the written direction of the beneficiaries hereunder, and after the payment to it of all money necessary to carry out said instructions. If any property remains in this trust twenty years from this date it shall be sold at public sale by the Trustee on reasonable notice, and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement.

In the event that the written direction to deal with the title to any property held hereunder involves the making of a contract or contracts by the Trustee, for the sale of said property, then the Trustee may require that the proceeds of sale be paid to it to be disbursed to the beneficiary or beneficiaries. In the event such contract or contracts would place an obligation upon the Trustee or the trust estate to pay encumbrances or assessments, to furnish local public improvements, to perfect title, or to incur any expense of any kind, in order to fulfill said contract, and the Trustee accepts such direction and acts thereunder, then such direction cannot be revoked, altered, or superseded in any way or in any part, without the Trustee's consent until all such obligations shall be fully paid, performed and satisfied, and the proceeds of such contract or contracts shall be paid to the Trustee. The trustee may apply such proceeds to the payment and satisfaction of all obligations of the Trustee, of this trust estate and of the beneficiary or beneficiaries to the Trustee hereunder, before distribution thereof shall be made to the beneficiary or beneficiaries, unless otherwise provided hereinafter or in such direction.

~~*Said Chicago Trust Company shall have and receive for its services the sum of $ ..... for accepting the trust and taking the title; $ ..... per year for holding title after the ..... day of ....., 19....., so long as any property remains in this trust; the regular schedule fees for making deeds; and*~~ It shall receive reasonable compensation for any special services rendered by it and its attorneys, solicitors and agents hereunder, or for taking and holding other property hereafter deeded to it hereunder.

In Testimony Whereof, the Chicago Trust Company has caused these presents to be signed by its Vice President, and attested by its Assistant Secretary, and has caused its cor-

porate seal to be hereto attached as and for the act and deed of said corporation, the day and date above written.

CHICAGO TRUST COMPANY,
By W. F. HOPKINS,
Vice President.

(Seal)
Attest:
BURT A. BOWLBY,
Assistant Secretary.

And on said day the said beneficiaries have signed this Declaration of Trust and Trust Agreement in order to signify their assent to the terms hereof.

MINERVA S. MELIDONES (Seal)
5915 N. Paulina
A. A. LEWIS, (Seal)
77 W. Washington.

29 This Agreement, Made and entered into this 12th day of December, A. D. 1925, by and between Minerva S. Melidones, of the City of Chicago, County of Cook, and State of Illinois, party of the first part, Albert A. Lewis, of the City of Chicago, County of Cook and State of Illinois, party of the second part, and Chicago Trust Company, a corporation, of the City of Chicago, County of Cook and State of Illinois, as trustee under the provisions of a trust agreement dated the 12th day of December, A. D. 1925, and known as Trust No. 1523, party of the third part, Witnesseth:

Whereas the party of the first part has on the date of the execution of this agreement caused to be conveyed to the Chicago Trust Company, as trustee under the provisions of a trust agreement dated on the date hereof and known as Trust No. 1523, good title in fee simple to real estate in the Village of Niles Center, County of Cook and State of Illinois, known and described as follows:

Lot Seventeen (17) in Owner's Subdivision of the West half (W½) of Section 21, Township 41 North, Range 13 East of the Third Principal Meridian, in Cook County, Illinois, (hereinafter sometimes referred to as Parcel No. 1);

Lot Eighteen (18) (except the South thirty (30) feet thereof) in said Owner's Subdivision (hereinafter sometimes referred to as Parcel No. 2.

That part of the Southeast quarter (SE¼) of the Northwest quarter (NW¼) and of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21, Township 41 North, Range 13 East of the Third Principal Meridian, described

as follows: commencing at a point on the South Line of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21 aforesaid 7.29 chains West of the Southeast corner thereof; thence running North 19.98 chains to center of highway; thence North 67¾ degrees West along the center of said highway 3.71 chains; thence South parallel to the East line of said quarter section 21.41 chains to the South Line of said Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21 aforesaid; thence East along said South line 3.47 chains to the place of beginning, (excepting from said premises a strip of land one rod in width lying East of and adjoining the West 820.2 feet of the South 40 rods of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21 aforesaid, conveyed to the Village of Niles Center by deed dated November 26, 1892, and recorded December 9, 1903, as Document 3477596, in Book 8378, page 462), also a strip of land three feet in width running the entire length of and immediately West of and adjoining that part of the Southeast quarter (SE¼) of the Northwest quarter (NW¼) and of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21, Township 41 North, Range 13 East of the Third Principal Meridian, In Cook County, Illinois, described as follows: commencing at a point on the South line of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21 aforesaid, 7.29 chains West of the Southeast corner thereof; thence running North 19.98 chains to the center of the highway; thence North 67¾ degrees West along the center of said highway 3.71 chains; thence South parallel to the East line of said quarter section 21.41 chains to the South line of said Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21 aforesaid; thence East along said South line 3.47 chains to the place of beginning, the East line of the land duly conveyed being 21.41 chains in length and the North line being the center line of Miller's Mill Road, in Cook County, Illinois (hereinafter sometimes referred to as Parcel No. 3);

The West 75 feet of Lot Nineteen (19) in said Owner's Subdivision, (hereinafter sometimes referred to as Parcel No. 4);

which said real estate has heretofore been platted and subdivided by the party of the first part into lots, streets and alleys under the name of Main St. and Lincoln Ave. Subdivision of Lots Seventeen (17) and Eighteen (18) and of part of

Lot Nineteen (19) in Owner's Subdivision of the West half (W½) of Section 21, Township Forty-one (41) North, Range Thirteen (13) East of the Third Principal Meridian, in Cook County, Illinois, said plat having been duly recorded in the Recorder's Office of Cook County, Illinois, as Document No. ..... and also registered in the Office of the
31 Registrar of Titles of Cook County, Illinois, as Document No. 26871, and the conveyance of said land has been made to said party of the third part under the legal description of Lots One (1) to One Hundred Eight (108), both inclusive, of said subdivision;

And, Whereas, the said party of the first part is desirous of securing the services of the party of the second part in selling the lots in said subdivision, and the party of the second part desires to sell said lots for the party of the first part;

And, Whereas, it is also desired that the party of the first part shall, if possible, acquire the title to the strip of land approximately 16.5 feet in width, which is excepted from the premises conveyed by the party of the first part to the party of the third part referred to as Parcel No. 3 aforesaid, and which strip is described as follows:

A strip of land one rod in width lying East of and adjoining the West 820.2 feet of the South 40 rods of the Northeast quarter (NE¼) of the Southwest quarter (SW¼) of Section 21 aforesaid conveyed to the Village of Niles Center by deed dated November 26, 1892, and recorded December 9, 1903, as Document 3477596, in Book 8378, page 462;

and upon so acquiring title shall convey or cause to be conveyed said strip of land to the party of the third part, as trustee as aforesaid, and shall cause the party of the third part to resubdivide said strip with Lots Fifty-six (56) to Sixty-five (65) both inclusive, Seventy-two (72) to Eighty-one (81) both inclusive, Eighty-two (82) to Ninety-one (91) both inclusive, and Ninety-eight (98) to One Hundred Seven (107) both inclusive, or some of them, so that the portions of said strip falling within Madison Street, Monroe
32 Street and Cleveland Street shown in the plat of said Main St. and Lincoln Ave. Subdivision aforesaid, and the part falling within north and south boundary lines of the alleys between the said streets shall become parts of said streets and alleys, and the portions of the said strip falling between two of the lots aforesaid shall become parts of lots in said subdivision or resubdivision of said lots.

Now, Therefore, in consideration of the respective covenants and agreements of the parties hereto hereinafter set forth, it is hereby covenanted and agreed by the parties hereto as follows:

Article I.

The party of the first part does hereby constitute the party of the second part, his heirs, executors, administrators, successors and assigns, exclusive selling agents of said property and of said 16.5 foot strip of land, if acquired by the party of the first part, and/or conveyed to party of the third part, during the term of this agreement, subject to the terms and conditions hereinafter set forth.

Article II.

The Chicago Trust Company, as such trustee under the provisions of the trust agreement hereinbefore referred to, does hereby declare and agree that it does and will henceforth hold title to said premises, and in the event that said 16.5 foot strip of land is conveyed to it that it will thenceforth hold title to said strip of land, in trust, for the uses and purposes and subject to the terms, covenants and conditions of said trust agreement as amended by this indenture.

33 Article III.

Section 1. The party of the first part shall forthwith apply for an owner's guarantee policy to the Chicago Title and Trust Company for Lots One (1) to One Hundred Eight (108) in said subdivision aforesaid, and shall, within a reasonable time, deliver to the party of the second part an owner's guarantee policy of the Chicago Title and Trust Company, in its usual form, guaranteeing the title of the party of the third part, as trustee, as aforesaid, against loss or damage to the extent of One Hundred Thousand Dollars ($100,000.00), by reasons of defects in or liens upon its title, as trustee as aforesaid, subject only to the following matters:

(1) Rights or claims of parties in possession not shown of record and questions of survey.

(2) Mechanic's liens, if any, where no notice thereof appears of record.

(3) Special taxes or special assessments, if any, which have not been confirmed by a court of record.

(4) Installments of special assessments falling due after

the date hereof for improvements heretofore completed, and special taxes or special assessments for improvements not yet completed.

(5) General taxes for the year 1925.

(6) Trust deed dated July 15, 1925 and recorded as Document No. 8985626 to Stephen S. Losch, trustee, conveying Parcel No. 4 aforesaid, securing a note for Fifteen Thousand Dollars ($15,000.00) of even date therewith, due July 15, 1929, with interest at six per cent (6%) per annum, payable semi-annually, and evidenced by eight (8) interest notes, said trust deed containing a releasing clause providing for the release of Lots 15, 16, 17, 18, 40, 41, 42, 43, 67, 68, 69, 70, 93, 94, 95, 96 and 108, in said subdivision, upon the payment of certain sums in said trust deed specified.

(7) Trust deed dated June 11, 1925, and recorded as Document 8949641 to Fernando J. LeBau, trustee, conveying Parcel No. 3 aforesaid, securing a note for Thirty-two Thousand Five Hundred Dollars ($32,500.00) of even date there-
34 with, due on or before June 11, 1929, with interest at six per cent. (6%) payable and evidenced by eight (8) interest notes, and containing a releasing clause providing for the release of lots 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, 35, 36, 37, 38, 45, 46, 47, 48, 64, 65, 72, 73, 90, 91, 98 and 99 from the lien of said trust deed upon the payment of certain sums in said trust deed specified.

(8) Trust deed dated July 11, 1925, recorded in the Recorder's Office of Cook County, Illinois, as Document 8975189, registered in the Office of the Registrar of Titles in Cook County, Illinois, as Document 264245 to Titus L. Thelin, Trustee, conveying Parcels Nos. 1 and 2 aforesaid, securing three (3) notes of even date therewith, two for Ten Thousand Dollars ($10,000.00) each, and one for Twelve Thousand Dollars ($12,000.00), due one, two and three and one-half years after their date respectively, with interest at six per cent. (6%) per annum, payable semi-annually, said interest being evidenced by interest coupons and containing a release clause providing for the release of lots 1 to 8 both inclusive, 24 to 34 both inclusive, 49 to 62 both inclusive, 75 to 88 both inclusive, and 101 to 107 both inclusive, in said subdivision, upon the payment of certain sums in said trust deed specified.

Section 2. Said party of the first part shall also cause to be released from the lien of said trust deeds those lots or portions thereof in the subdivision aforesaid which are included in the land conveyed by any of said trust deeds, and

for which lots or portions thereof no provision is contained in the trust deed covering the same for the release thereof upon the payment of a specified sum.

Section 3. The party of the first part shall also, within a reasonable time after acquiring title to said 16.5 foot strip of land, cause the trustee herein to resubdivide the same with Lots 56 to 81 both inclusive, and 82 to 91 both inclusive and 98 to 107, both inclusive, or some of them, in such manner that that portion of said strip falling within Madison Street, Monroe Street and Cleveland Street and the North and South boundary lines, as extended of the two alleys between said streets, shall become a part respectively of said streets and alleys, and the remainder of said strip shall become a part of the lots in said resubdivision, provided that said resubdivision, if desired, may be made of said strip with only a portion of the lots above specified, and the said party of the first part shall further furnish, within a reasonable time, a further continuation of said guarantee policy showing good title in said trustee to said resubdivision, subject only to the matters Nos. 1 to 5, tabulated and enumerated in Section first of this article aforesaid. The sales price of any lot in said resubdivision shall be that proportion of the previous sales price which the frontage bears to the frontage of the old lot which is a part of the new one.

Section 4. Whenever lots in said subdivision and/or in said resubdivision aggregating a gross purchase price of One Hundred Thousand Dollars ($100,000.00), as hereinafter provided, have been sold, the party of the first part shall increase the title insurance an additional One Hundred Thousand Dollars ($100,000.00); and when Two Hundred Thousand Dollars ($200.000.00) shall have been sold, he shall increase it an additional One Hundred Thousand Dollars ($100,000.00), and when Three Hundred Thousand Dollars ($300,000.00) shall have been sold, he shall increase it to an amount equal to the gross sales price of all of the lots in said subdivision and resubdivision, as shown in the sales plat hereinafter referred to.

Article IV.

Section 1. The party of the first part hereby constitutes, makes and appoints the said party of the second part as manager of the trust created by said deed in trust and trust agreement aforesaid, irrevocably for a term as hereinafter provided, and said party of the first part hereby delegates to the manager such powers and duties in con-

nection with the administration of said trust as may be necessary to facilitate the sale of said land in accordance with the terms of this agreement. The party of the second part hereby agrees to exercise reasonable diligence in effecting sales of the property hereinbefore described, and will make an effort to secure purchasers for all of said property in as short a period as possible. The party of the second part shall not, however, be required to commence making sales of Lots 1 to 55 both inclusive, Lots 66 to 71 both inclusive, 92 to 97 both inclusive and 108 (said lots being hereinafter referred to as "lots comprising Section 1") until the party of the first part has complied with the provisions of Article III, Sections 1 and 2 aforesaid, nor as to Lots 56 to 65 both inclusive, 72 to 91 both inclusive, and 98 to 107 both inclusive (said lots being hereinafter referred to as "lots comprising Section 2") until the provisions of Article III, Sections 1, 2 and 3 have been complied with by the party of the first part. It is understood and agreed, however, that the party of the second part and his organization has for sale property other than that herein described, and will, from time to time, acquire other properties for sale, and nothing herein contained shall limit the number or location of other properties which the second party or his organization may acquire for sale or become selling agents for, or prevent employment of salesman or sales managers by the second party for the sale of other properties. All salesmen, sales managers, and sales directors employed by the second party shall be employed in his name and be paid by him, and the second party hereby agrees to save, protect and hold harmless the first party against
37 all claims, whether or not such claims are justified, arising out of non-payment of a commission to any of said employees.

Section 2. The powers hereby delegated to said manager in effecting sales of lots and making conveyance of various lots to various purchasers shall be as follows:

(a) To assume and exercise the management and control of the property held in trust by Chicago Trust Company, as trustee, for the purpose of disposing of said property, subject to the terms and conditions hereinafter set forth.

(b) To employ, and at his own expense, a sales organization, clerks, and such other assistants as he may deem necessary for the sale of said property.

(c) To select and approve purchasers for any of said lots, both as to character and financial responsibility, and to enter into contracts with said purchasers in the name of the trust

of which Chicago Trust Company is trustee, as aforesaid, and to execute such contracts as "manager" of said trust. Such contracts, however, shall be only upon terms as hereinafter specified. Said Chicago Trust Company may itself execute such contracts if the party of the second part desires it to do so.

(d) To request the trustee to execute deeds and such other instruments as are necessary in the sale and conveyance of said property.

(e) To consent, in the name of said trust and in his own discretion, to assignments by any purchasers of their interest under any of said contracts.

The said trust created by said deed in trust and trust agreement has been and is hereby designated as Main St. and Lincoln Ave. Realty Trust

Article V.

Section 1. The second party shall prepare the contract of purchase and shall execute same with the purchasers of lots, but in the name of the trust of which Chicago Trust
38 Company is trustee as aforesaid, by the party of the second part as manager of said trust. If said second party so desires, said contract may be signed by said Trustee as vendor. The form of the contract to be used for purchasers of any of said property shall be substantially in the form now used by the second party in selling property in and about the Village of Niles Center, Illinois, and a form of one of said similar contracts is hereto attached and marked "Exhibit A". Said contract shall include an agreement by the trust estate to furnish the purchaser a guarantee policy in the amount of the purchase price issued by the Chicago Title and Trust Company and a lot described in said contract or contracts, Torrens certificate, where the lot or a portion thereof is registered, for each and to install, by private contract or cause to be installed by special assessment, and without expense to the purchaser and at the expense of the trust estate, sidewalks in front of all lots in said subdivision and along the street side of corner lots.

The contract or contracts shall, unless otherwise agreed between the parties hereto, contain conditions and restrictions to be also included in the deed substantially as shown in said Exhibit A, except that the 15 foot building line shall be only on Lots 28 to 107 in said subdivision, and on lots in said resubdivision and except that the lots to be restricted to resi-

dence purposes, and so forth, as provided in clause No. 4th of said restrictions in said contract shall be Lots 17 to 107 both inclusive, and any resubdivision of a portion of them as herein contemplated, the lots on which business or other uses are permitted being Lots 1 to 16, both incusive, and Lot 108 in said subdivision.

Section 2. The sales price of each lot shall be not less than the price shown in the annexed sales plat hereto attached
39 and marked "Exhibit B", provided that in the event the party of the second part desires to sell at a lower price and adjust his commission so that the principal of the net sales price to be realized, after deducting the commission, is the same as would have been realized if the sale had been at the plat price and the full commission had been deducted, then the party of the second part shall have the right to sell at such lower price and said sales price, except as aforesaid, shall not be reduced below the amount shown on the said plat, except with the consent of the party of the first part.

Article VI.

The regular terms upon which sale of said lots shall be made shall be an initial payment of an amount equal to not less than twenty-five per cent. (25%) of the total sales price of each lot at the time the contract for said lot is executed. The balance of said sales price for said lot shall be in monthly installments, each for an amount equaling one per cent. (1%) of the sales price payable over a period of not exceeding thirty-nine (39) consecutive months, and a final payment of the balance of the purchase price on the last month but not exceeding the fortieth month. Interest at the rate of six per cent. (6%) per month shall be payable monthly on each installment and semi-annually on the entire balance remaining from time to time unpaid. The party of the second part may sell on other terms of sale, such as making the principal payments and the interest fall due quarterly or semi-annually, and in such case the interest may be made to fall due quarterly or semi-annually respectively, provided that in no case shall the total principal payments falling due each six
40 months be less than the amount which would have been realized if the contract were made on a basis of payments of one per cent. (1%) per month, and that in no event shall the payment of the entire balance fall due in less than forty (40) months from the date of the contract. If desired by the party of the second part, the contracts may be made so that the payments subsequent to the down-payment by the pur-

chaser may be a fixed sum each month, for not to exceed thirty-nine (39) months, which sum shall include principal and interest at the rate of six per cent (6%) monthly on the unpaid balance from time to time remaining unpaid, payable monthly, and which sum shall be not less than one and one-fourth (1-1/4) per cent. of the purchase price, with a final payment of the balance of entire purchase price on the last month, but not exceeding the fortieth (40) month. In the event the sales are made on terms of one and one-half per cent (1½%) or more of the principal per month after the down-payment, then the interest may be made payable on each installment of the balance of the contract as it falls due. A discount of five per cent (5%) of the sales price of any lot sold may be granted to the purchaser thereof if he pays the total consideration for said lot in cash within thirty (30) days from the time of the purchase, and a discount of one per cent. (1%) per annum from date of payment to the date the final payment is due on the entire balance remaining unpaid may be allowed to the purchaser if, after the making of the contract, he pays the balance of the purchase price in advance. The second party shall have the right to take notes or other consideration for such portion of the purchase price as represents his commission, provided that there shall be left in the down or initial payment at least six per cent. (6%) in cash of the purchase price.

41 Article VII.

The party of the first part further covenants and agrees that the party of the second part shall have the sole right of possession of the premises during the term of this contract. If it shall be deemed necessary in the opinion of the second party that any of said land be cleared of rubbish, brush or any other growth or obstruction, the work of clearing said land shall be done at the cost and expense of said first party. Any buildings on any portion of the premises herein described, or the streets or alleys thereof, shall be removed by the first party at his expense within fifteen (15) days from the date hereof, provided that it is understood and agreed that one, Losch, has a lease on certain buildings expiring on November 1, 1925, and to be terminated thereafter on sixty (60) days' notice. The party of the first part shall have given the required sixty (60) days' notice to said Losch, so as to terminate said lease not later than January 1, 1926, and said buildings so under lease to said Losch shall be removed by the party of the first part at his expense not later than

January 15, 1926. The second party shall also have the right to stake out and put number stakes on said subdivision for the purpose of sale, the cost thereof to be paid by the party of the first part.

The second party may, at his own cost and expense, erect an office on said property, and hereby agrees to pay for said office and to hold harmless the first party and said property from any claim or lien by any contractor or material man on account of construction of said office, and further agrees to remove said office from said property at the termination of said contract.

The second party agrees, at his own cost and expense, to advertise the sale of the said premises in such mediums
42 and in the manner he deems necessary, and to use his name and/or the name of his firm in a manner that will produce sales of lots in said subdivision.

Article VIII.

It is expressly understood and agreed that the rights of all parties hereunder shall be subject and subordinate to the rights of any and all purchasers of said lots in said subdivision and/or in said resubdivision (if made), and no termination of this agreement shall in any way affect the rights of any of said purchasers of lots in said subdivision, and all parties agree to respect the rights of said purchasers. It is further agreed that upon the performance by the purchaser of any lot of the covenants by him to be performed under his contract, said party of the third part shall, at the request of said purchaser or of the party of the second part convey said lot to said purchaser and deliver to said purchaser a guarantee policy guaranteeing the title of the trustee to said lot in the amount of the purchase price, and if any portion of the property is registered under the Torrens system, to furnish to the said purchaser a Torrens certificate of title to said lot or such portion thereof so registered, issued by the Registrar of Titles of Cook County, Illinois, showing good title in the purchaser, as provided in the contract. The cost of such guarantee policy and/or Torrens certificate to be paid by the party of the first part.

Article IX.

And it is expressly understood and agreed that upon the written direction of the party of the second part said Chicago Trust Company, as trustee under the trust hereinbefore

mentioned, will convey said lot to said purchaser. Said Chicago Trust Company, as such trustee, shall also, at the
43 written direction of the party of the second part, contract for or give consent on behalf of said property for the use of any street, alley, park or public place for railroad, street, gas or electric conduits, pipe lines or other equipment or other public or semi-public improvements, or shall petition any municipal corporation for the construction of any sidewalk, street or other public improvements, and such written direction from the party of the second part to said trustee directing the execution of any instrument provided for in this article shall constitute full and complete authority for the trustee hereunder to execute such instruments or perform the acts provided to be performed by it.

Nothing herein contained shall be construed as imposing any personal liability of any nature or kind whatsoever upon the trustee for any acts performed by it as the trustee hereunder in accordance with the terms hereof, nor for any acts, contracts or agreements of the manager hereunder. The trustee shall promptly notify the manager and the first party of any suit brought or made against it arising out of the trusteeship thereby created.

Said party of the third part shall execute the contracts of purchase, if so desired by the party of the second part.

Article X.

The party of the second part may, at his discretion, and shall, upon the written request of the party of the first part, or the party of the third part take such steps as are required under the terms and provisions hereof and/or under the terms and provisions of any contracts of sale theretofore executed, which the vendor is entitled to forfeit by reason of any
44 default or defaults on the part of the vendee therein named, to cause a forfeiture of any of such contracts of sale, and in the event any resale is made of such lots by the party of the second part, as manager of this trust, his compensation shall be governed by the terms of this agreement. The party of the third part may also and shall, at the request of the party of the second part, consent to the assignment by purchasers of lots in said Main St. and Lincoln Ave. Subdivision aforesaid of their interest in said contracts.

Article XI.

Section 1. The rights of the second party under this agreement shall constitute an exclusive sales agreement, which exclusive sales agreement shall continue for a period of nine (9) months from the time the party of the second part is required to commence making sales of lots in Section 1 under the terms of this agreement, and as to lots in Section 2, for a period of nine (9) months from the time party of the second part is required to commence making sales of lots in Section 2 under the terms of this agreement, provided that the party of the second part shall nevertheless have the right, if he so desires, to commence sooner making sales of lots in Section 2 or any of them, except as to Lots 62, 63, 74, 75, 88, 89, 100 and 101.

Section 2. As compensation for his services in making such sales the party of the second part shall receive a commission of thirty-three and one-third per cent. (33-1/3%) of the gross selling price of each lot, payable only out of moneys realized from the sales of said lots in the manner following:

(a) Where a lot is sold for cash the party of the sec-
45 ond part shall receive his entire commission in cash.

(b) On other sales, the party of the second part shall receive the down-payment, such down-payment not to exceed twenty-five per cent. (25%) of the purchase price; and out of any excess of the down-payment above twenty-five per cent. (25%) of the sales price, and out of each subsequent payment the party of the second part shall receive forty per cent. (40%) of the same, until and when he shall have received his entire commission of thirty-three and one-third per cent. (33-1/3%) on each contract of sale. The party of the second part shall also receive twenty per cent. (20%) of the interest due monthly on each installment contract until such time as he shall have received the entire commission of thirty-three and one-third per cent. (33-1/3%) out of the down-payment and principal of the subsequent payments.

(c) The party of the second part has, at the time of the execution of this agreement, advanced to or for the party of the first part the sum of Five Thousand Dollars ($5,000.00), of which Twenty-six Hundred Fifteen Dollars ($2615.00) has been paid to the party of the first part in cash, receipt whereof is by him hereby acknowledged, and the remaining Twenty-three Hundred Eighty-five Dollars ($2385.00) has been deposited by the party of the second part with the party of the third part, for the use and benefit of the party of the

first part, for the purpose of meeting and paying the semi-annual interest of Nine Hundred Seventy-five Dollars ($975.00) due December 11, 1925, on the encumbrance of Thirty-Two Thousand Five Hundred Dollars ($32,500.00) to Fernando J. LeBau, Trustee, as aforesaid, also the semi-annual interest of Nine Hundred Seventy-five Dollars ($975.00) due January 11, 1926, on the encumbrance of $32,000.00, to Titus L. Thelin, Trustee, and also the semi-annual interest of Four Hundred Fifty Dollars ($450.00) due January 11, 1926, on the encumbrance of $15,000.00, to Stephen S. Losch, Trustee. The party of the third part is hereby authorized and directed to pay said sums of interest on said respective encumbrances as and when the same fall due. Said sum of Five Thousand Dollars ($5,000.00), so advanced by the party of the second part, shall be repaid to him by the party of the third part out of the remaining sixty-six and two thirds per cent. (66-2/3%) of any cash sales and out of sixty per cent. (60%) of principal and the share of the interest due the party of the first part from payments on sales contracts subsequent to the down or initial payment as and when monthly statements and accountings are rendered by the party of the third part.

Section 3. It is further agreed that upon the expiration of said exclusive agency, as herein provided, the first
46 party may withdraw from said trust agreement any of the lots in said subdivision that remain unsold at the date of withdrawal, but any such lots so withdrawn shall be subject to the building line and other restrictions which are provided in this agreement, or in the contracts of sale. If said lots are not so withdrawn. and until the time they are so withdrawn, the second party may continue the sale of same, and any sales made shall be subject to the terms of this agreement. From the time of the withdrawal of any such lots, this agreement shall, however, continue as to sales of lots made prior to said withdrawal, and as to collections made from any such sales.

Article XII.

Section 1. All costs of survey, subdivision, platting, fees of trustees, fees for collection, costs and expenses in connection with forfeiture of contracts, expenses of putting said real estate in shape for sale, such as staking, putting in number stakes, levelling, and so forth, for cement sidewalks, as provided in this agreement, guarantee policy, Torrens certificate costs and other expenses in connection with this agree-

ment (except the selling expense which shall be paid by the party of the second part, out of his commission) shall be paid by the party of the first part.

Section 2. Party of the first part shall also promptly pay and discharge all principal and interest from time to time falling due on the three mortgages hereinbefore described which are now upon said real estate or parts thereof, and shall hold and save harmless the parties of the second and third part, the said property, and any purchasers of lots, of and from any and all claims, demands, causes of action, costs, expenses, and attorney's fees in connection with said mortgages and/or in connection with any suits brought against any such parties or against such property by reason of any matters or things arising out of said mortgages or any of them.

47

Section 3. For the purpose of paying the principal payments on said three mortgages, and of paying all interest due on the same after the payment of the first semi-annual interest on each of said three mortgages, (for which latter interest deposit has been made with the Trustee, as aforesaid), and for the purpose of paying the cost of sidewalk improvements and for the purpose of paying all other items required hereunder to be paid by the party of the first part, as in this agreement provided, the said party of the third part, the Trustee herein, shall withhold out of the portion of the excess over the first twenty-five per cent. (25%) of the sales price of said lots and out of the share of first party in any cash sales, after the re-payment of the sum of Five Thousand Dollars ($5,000.00) advanced by the party of the first part, as aforesaid, the share of the party of the first part in the principal and interest on such "subsequent payments", until such time as said reserve is sufficient to pay all of the above items so required to be paid by the party of the first part, and said trustee shall, at the order of the party of the first part, from time to time use and apply any sums so retained in payment of any of the matters or things, including the principal and interest of the mortgages for which said sums are so held in reserve.

Section 4. On the refusal or failure of the party of the first part to cause said sums to be applied as aforesaid, on any of said items, including the principal and interest of said mortgages as and when the same are required to be paid, said trustee may itself, and shall at the direction of second

party, pay such sums out for such purposes. Said party
48 of the second part shall also have the right, at his option (but shall not be required so to do) to advance any moneys from time to time for any of said items, including principal and interest on said mortgages, required to be paid by the party of the first part, and any money so paid by him shall bear interest at seven per cent. (7%) per annum from the date of each advancement by the party of the second part and shall be repaid to him, on demand, by the party of the first part, and shall be refunded to him by said trustee at his request, out of said reserve, upon evidence of payment of same, and the party of the second part shall have a lien upon the interest of the party of the first part under this agreement, and the trust hereby created, for said sum of Five Thousand Dollars ($5,000.00) so advanced by him, as aforesaid, and for any other moneys advanced by him from time to time for any of the purposes aforesaid.

Section 5. The sidewalk improvements herein specified shall be made within two years from the commencement of sales by the party of the second part.

Section 6. The party of the second part shall have an interest in each contract of sale made by him pro tanto in accordance with the provisions of this agreement and shall have the right to place a notice on each original contract of such interest.

Section 7. The interest of the party of the first part under this agreement shall always (subject to the rights of purchasers of said lots) be security for the payment of all moneys due for principal and interest on the encumbrances hereinbefore mentioned, as and when the same fall due.

49 Article XIII.

Section 1. Said party of the second part shall collect the down or initial payment on any contract, retaining the portion to which he is entitled, and paying the balance to the trustee herein for distribution, as herein provided. He shall, in the same manner, collect the payment when the entire purchase price is paid in cash, and likewise disburse the same, as aforesaid.

Section 2. Said trustee shall collect all the other moneys paid in by purchasers of each lot from time to time, and retain and disburse the same, in accordance with the provisions of this agreement.

Section 3. Said trustee shall keep such books and records

as are necessary and proper, showing the name and address of each purchaser of lots, the amount of the contract, all payments made under the terms of same, the balance due from time to time thereunder, and any other data necessary, and shall, if necessary, send a notice to each purchaser of the amount of each installment falling due and the interest thereon.

Section 4. Said trustee shall distribute said moneys as required by the terms of this agreement and shall withhold the amount of reserve hereunder required, and shall distribute, apply and pay out said reserve as provided by this agreement.

Section 5. One of the signed contracts for the sale of said lots shall be delivered to and held by said trustee, and a copy delivered to the party of the second part.

Section 6. Said trustee shall make distribution of all collections made by it during any month to the respective beneficiaries hereunder on the 10th day of the following month, and shall deliver to each of the parties of the first and second part a statement of such collections showing the person from whom collected, the date and amount thereof, the lot and block number of each lot, so that the parties may be able to ascertain from such statements the amount to date paid by purchasers on each lot on any of said contracts.

Section 7. As compensation for its services as such trustee, said party of the third part shall receive a compensation of Three and one-half per cent. (3½%) of the amount of the moneys collected or received by it, which shall be paid promptly by the party of the first part or may be deducted by said trustee from any amounts due the party of the first part or from said reserve. It is understood, however, that should the interest of the party of the second part be terminated hereunder in any way or become a matter of dispute between the parties hereto, then the reasonable fees of the trustee for its ordinary services hereunder as well as its fees for services rendered in connection with any litigation or controversy involving the trustee or this trust estate, together with its costs and expenses, including attorneys' fees, may be deducted and withheld from any part of the trust estate, or collections therefrom, in its hands, without regard to which parties hereto may be entitled otherwise to said part or parts.

Article XIV.

This agreement shall not be construed as creating a partnership, and shall not be placed of record.

Article XV.

This agreement shall be binding upon and inure to the
51 benefit of the heirs, executors, administrators and assigns of the respective parties hereto. Each of the beneficiaries hereunder (the parties of the first and second part) shall have the right to assign their respective interest or interests or any part thereof under this agreement and/or in their respective interests in the contracts of purchase, but the party of the second part shall not assign his right to act as exclusive sales agent hereunder, except if such assignment be to the A. A. Lewis Realty Association, or a corporation formed to take over the business of the said A. A. Lewis Realty Association.

Article XVI.

The attached amendatory agreement is part of the within agreement.

In Witness Whereof. the said parties have hereunto set their hands and seals the day and year first above written.

(Signed) MINERVA S. MELIDONES (Seal)
A. A. LEWIS (Seal)
CHICAGO TRUST COMPANY as Trustee under Trust No. 1523 aforesaid. (Seal)
By W. F. HOPKINS
Vice President.

Attest:
BURT A. BOWLBY
Asst. Secretary.

52 Whereas an agreement has been prepared, dated the 12th day of December, 1925, between Minerva S. Melidones, party of the first part, Albert A. Lewis, party of the second part, and Chicago Trust Company, a Corporation, as Trustee under the provisions of a certain trust agreement dated the 12th day of December, A. D. 1925, and known as Trust No. 1523, party of the third part, and it is desired to amend said agreement before the execution of same withont revising or re-writing the same,

Now, Therefore, at the time of the execution of said first-mentioned agreement, and as part of the same, it is agreed as follows:

First: The party of the first part represents that she has already acquired title to said sixteen and five-tenths (16.5) foot strip referred to in Article One (1) of the first-mentioned agreement, and it is understood that a separate sub-division may be made of said strip alone into Lots A, B, C, and D, without joining it in a resubdivision with lots in the subdivision of the remaining property already made. Said subdivision may be made by the party of the first part before the conveyance of said strip to the party of the third part, in which event such conveyance may be made by the description of lots in the subdivision of the strip. If the subdivision of said strip is not made by the party of the first part before conveyance to the party of the third part, then the subdivision plat of said strip alone into Lots A, B, C and D, as directed by the party of the second part shal be executed by the party of the third part, after conveyance of the strip to it. All provisions of the first-mentioned agreement, with reference to a resubdivision of said strip with other lots shall apply to
53 the original subdivision of said strip alone as fully and effectually as though it were described as a subdivision of said strip in said agreement in every place where reference thereto is made.

Second: The advance of Five Thousand Dollars ($5,000.00) by the party of the second part to the party of the first part referred to in Article Eleven (XI), Section Two (2), Subdivision "c" of the agreement first-mentioned in this document, has not been made and said agreement is hereby modified and amended in the following respects:—

(a) Out of the down payment or the first Twenty-five per cent. (25%) of the sales price (if it exceeds Twenty-five per cent. (25%), the party of the second part shall retain Nineteen per cent. (19%) of said sales price. The remaining Six per cent. (6%) is to be paid to the Trustee and held by it and applied and used for the purpose of meeting the principal and interest payments on the three (3) mortgages, and all other items provided in Article Eleven (XI), Section Three (3) of said first-mentioned agreement, and the share of party of the first part in the principal and interest on the payments subsequent to the down payment shall likewise be applied to said reserve and used as in said agreement provided. In all other respects said agreement shall remain in full force and effect and is only modified as herein expressly provided.

Witness the hands and seals of said parties this 12th day of December, A. D. 1925.

MINERVA S. MELIDONES (Seal)
A. A. LEWIS (Seal)
CHICAGO TRUST COMPANY, as Trustee under Trust No. 1523 as aforesaid,
By W. F. HOPKINS,
Vice President.
(Seal)
Attest:
BURT A. BOWLBY,
Asst. Secretary.

1935. 8 UNTIED STATES BOARD OF TAX APPEALS.

• • (Caption—75010) • • •

Trust under which a trustee held title to real estate during the subdivision thereof held not an association.

Commissions on sales of lots, held properly treated as expenses.

Franz W. Castle, Esq., and *Raymond A. Guggan, Esq.*, for the petitioner.

B. M. Coon, Esq., and *John W. Smith, Esq.*, for the respondent.

MEMORANDUM OPINION.

ARUNDELL: The respondent determined a deficiency in income in the amount of $512.30 for the year 1931. Petitioner alleges error in respondent's classification of the trust herein as an association and in the use of an improper accounting method to determine income.

On December 12, 1925, Minerva S. Melidones, hereinafter called the grantor entered into two agreements respecting certain real estate owned by her in the Village of Niles Center, Cook County, Illinois. One of the agreements, designated "Declaration of Trust" provided for the placing of title in the Chicago Trustee Company (predecessor of Centrxl Republic Trust Company) as trustee "for the ultimate use and benefit of" the grantor and A. A. Lewis. The trust so created was known as Trust Number 1523. The trust instrument provided that, while the trustee had full power to deal with the real estate so far as the public was concerned, it was
9 agreed by the parties that it would do so only in accordance with the agreement attached thereto.

The agreement attached to the trust instrument, dated December 12, 1925, was executed by the grantor and the trustee above mentioned and by A. A. Lewis. Lewis was an experienced real estate man who specialized in the subdivision of land in the vicinity of Niles Center, Illinois. Under the agreement Lewis was appointed exclusive selling agent of the land which was to be subdivided into lots. The grantor appointed Lewis "manager of the trust created by said deed in trust and trust agreement aforesaid". The grantor delegated to Lewis "such powers and duties in connection with administration of the trust as may be necessary to facilitate the sale of the said land". Among the powers specifically delegated to Lewis were the following: to exercise management and control of the trust property for the purpose of selling it; to employ, at his own expense, a sales organization; to select and approve purchasers for the lots, both as to character and financial responsibility, and to enter into contracts with the purchasers in the name of the trust as "manager" of said trust; to request the trustee to execute deeds and other necessary instruments. Lewis agreed, at his own expense, to advertise the property for sale. The trustee agreed to convey title to purchasers of lots upon the written direction of Lewis.

As compensation for his services Lewis was to receive 33⅓ per cent of the gross selling price of each lot. On cash sales he was to retain his entire commission in cash. On deferred payment sales he was to retain the down payment, but not to exceed 25 per cent of the selling price, and out of subsequent payments he was to receive 40 per cent of each payment until the total received amounted to 33⅓ per cent of the selling price.

Lewis was to collect the initial payments on deferred payment sales. All subsequent payments were to be collected by the trustee. The trustee was to receive 3½ percent of collections made by it.

All costs of surveying and subdivision, fees for collection, expenses of putting the real estate in shape for sale and putting down cement sidewalks were to be borne by the grantor. For the purpose of meeting such expenses the trustee was to retain a portion of the collection made by it, which would otherwise go to the grantor, and to apply the fund so accumulated to the payment of such expenses.

The trust here involved is in all substantial respects like those in *Highlands, Evanston-Lincolnwood Subdivision, First Addition, Trust No. 1546, Central Republic Trust Company as Successor by Consolidation*, 32 B. T. A. ....., in which upon

analysis of the form and operation of the trusts we held that they were not to be classified as associations. The facts in the present case are in some respects more favorable to the petitioner than in the cited cases. Here there was but one grantor, no certificates of interest were issued, although the trust agreement provided that they might be, and the powers and duties of the trustee were even more limited than in the above cases. There was not in this case any group of persons corresponding to stockholders in a corporation nor to corporate directors. Following the *Highlands, Evanston-Lincolnwood* cases we hold that the trust here was not an association.

The other question has to do with the method of computing income from the sale of lots. No evidence was offered on this matter. All we have to go on is the deficiency notice and the arguments of counsel. From these it appears that the respondent treated the commissions to Lewis as decutions from gross income, rather than treating them as reductions of selling price as contended for by petitioner. Respondent's action in this respect is in accordance with Article 352, Regulations 74.

11 We have no facts in this case to which to apply any decision made on this question but aside from this, petitioner has not convinced us of any error either in the provision of the cited Article of the Regulations or the respondent's application thereof.

Decision will be entered under Rule 50.

Entered
Jun. 14, 1935
(Seal)

12 UNITED STATES BOARD OF TAX APPEALS.

8, 1935.

* * (Caption—75010) * *

DECISION.

Pursuant to the memorandum opinion entered June 14, 1935, the respondent herein on July 1, 1935, having filed a notice of settlement and proposed recomputation, and the petitioner herein on July 15, 1936, having filed an acquiescence in said recomputation, it is

Ordered and Decided: That there is no deficiency in income tax for the year 1931.

Enter:

(Signed) C. ROGERS ARUNDELL,
Member.

mob
Entered Jul 18 1935.

18 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed Oct.

* * (Caption—75010) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Oct. 18, 1935.

To: A. A. Lewis & Co., Main & Lincoln Ave., Subdivision Trust #1623, Central Republic Trust Co., et al, 208 S. LaSalle Street, Chicago, Illinois.
Raymond A. Duggan, 35 E. Wacker Drive, Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the fourteenth day of October, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error, as filed, is hereto attached and served upon you.

Dated this fourteenth day of October, 1935.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 15th day of October, 1935.

CENTRAL REPUBLIC TRUST CO.,
By T. J. FINWELL,
Respondent on Review.
WILLIAM J. FLAHERTY, for Wm. L. O'Connell, Rec.,
Counsel for Respondent on Review.

1935. 13 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—75010) * *

PETITION FOR REVIEW AND ASSIGNMENTS OR ERROR.

Filed Oct. 14, 1935.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes, Guy T. Helvering, Commmissioner of Internal Revenue, by his attorneys, Frank J. Widean, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and B. M. Coon, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner on review is the duly appointed and qualified Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States. The respondent on review, the taxpayer, is A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust #1523.

Central Republic Bank and Trust Company, as trustee for A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust #1523, through its trust officer, Roy K. Thorne, filed a fiduciary return Form 1041, and no other return of the income of said trust for the year 1931, with the Collector of Internal Revenue in the First Collection District for the State of Illinois, whose office is located within the jurisdiction of the United States Circuit Court of Ap-

14 peals for the Seventh Circuit.

II.

The Commissioner of Internal Revenue returned deficiency in income tax against said trust for the year 1931 in the amount of $512.30, and on January 3, 1934, in accordance with the provisions of Section 272 of the Revenue Act of 1928, sent to the respondent herein a notice of such deficiency.

On March 5, 1934, the taxpayer filed with the United States Board of Tax Appeals its petition whereby it appealed from the said tax notice of deficiency to the said Board. The ap-

peal bears Docket No. 75010. The Board promulgated its Memorandum Opinion in the case on June 14, 1935, and entered its decision and final order on July 18, 1935, holding and deciding that taxpayer was not an association, taxable as a corporation.

The question in the case is as follows: Is a trust or an association taxable as a corporation created under the following circumstances: The owner of undeveloped acreage land enters into a written agreement with an experienced subdivision developer and a trust company pursuant to which legal title is transferred to the trust company, and the property is subdivided and so under the management of the subdivision developer, all parties signing an agreement outlining the plan of business which by reference is a part of the Trust Instrument?

III.

Minerva S. Melidones, owner of undeveloped acreage real estate, for the purpose of subdividing and selling the same simultaneously entered into the written agreements affecting the property. One of the agreements, designated "Declaration of Trust", provided for the placing of title in the Chicago Trust Company (predecessor of Central Republic Trust Co.) as trustee for the ultimate use and benefit of "the grantor and A. A. Lewis". The trust so created was known as Trust #1523. The trust agreement stipulated among other things that the trustee "will hold it (the real estate) and the proceeds, profits, and avails thereof, if any, which may come to its hands by direction of the beneficiary or beneficiaries or by the specific terms thereof, in trust for the ultimate use and benefit of the following named persons according to the respective interests herein set forth, to-wit, Minerva S. Melidones, A. A. Lewis, as shown by the attached agreement." The trust agreement provided that it should not be recorded. A. A. Lewis was designated therein as Manager of the trust and trust agreement aforesaid irrevocably for a term as hereinafter provided." The attached agreement was signed by the owner-grantor, agent-manager, and the trustee and is a full and detailed contract relative to the subdividing, handling and selling of the real estate.

The above described trust is an organization composed of "beneficiaries", and "agent" and a "trustee", voluntarily united in a business enterprise engaged in the real estate business for profit under a so-called declaration of trust which

provides for beneficial interests in the business that are transferable as personal property, the management of the enterprise being vested in a Board of Managers having power and responsibility like that conferred upon corporate directors, which managers by joint action of the trustee and the beneficiaries conduct a business pursuant to the purpose for which the association was created in the manner set forth in the declaration of trust.

The trustee does not merely collect the income. Article V of the Trust Agreement provides that the Chicago Trust Company, as trustee, shall subdivide and plat the property.

Article XIV of the said instrument provides that the trus-
16 tee shall convey the lots of the subdivided property to the purchasers thereof who have complied with the provisions of their contract. Furthermore, the sale contract specifies that the trustee shall furnish cement side walks in front of each lot and along the street sides of each corner lot.

It is an association within the meaning of Section 701(a)(2) and (5) of the Revenue Act of 1928, Section 704 (a) and (b) of the Revenue Act of 1928 and Regulations 74, Articles 1312 and 1314.

IV.

The petitioner herein, the Commmissioner of Internal Revenue, shows that he is aggrieved by the action of the said United States Board of Tax Appeals and injured thereby, and that the errors complained of are as follows:

1. The Board of Tax Appeals erred in finding, holding and deciding that the enterprise formed by the trust agreement dated December 12, 1925, and known as Trust No. 1523, was not an association under Section 701(a)(2) of the Revenue Act of 1928.

2. The Board of Tax Appeals erred in not finding, holding and deciding that the said enterprise was an association under said Section 701(a)(2) of the Revenue Act of 1928.

3. The Board of Tax Appeals erred in construing the evidence as determining that the said Trust No. 1523 was a mere fiduciary and/or trust created primarily for the purpose of affording security to a small group of subscribers of funds to a real estate corporation.

4. The Board of Tax Appeals erred in finding, holding and

deciding contrary to the evidence that the so-called Trust No. 1523 was a mere trust and not an association.

17 5. The Board of Tax Appeals erred in deciding the case for the taxpayer contrary to the evidence.

6. The Board of Tax Appeals erred in that the findings of fact are not based upon any substantial evidence.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of the record be prepared in acordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN,
Frank J. Wideman,
Assistant Attorney General.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
B. M. COON,
Special Attorney, Bureau of Internal Revenue.

United States of America, }
District of Columbia. } ss.

B. M. COON, being duly sworn, says that he is a special attorney of the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

B. M. COON,
Special Attorney Bureau of Internal Revenue.

Sworn and subscribed to before me this 14th day of October, 1935.

GEORGE W. KIERS,
(Seal) *Notary Public.*

My commission expires Nov. 16, 1937.

56 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—75010) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time of preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to April 1, 1936.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
Dec. 4, 1935.
jd

Now, July 21, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

57 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—75010) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to June 1, 1936.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
March 24, 1936.
jd

Now, July 21, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

58 UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—75010) • •

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to August 1, 1936.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C.,
May 25, 1936.

Now, July 21, 1936, the foregoing order enlarging time certified from the record as a true copy.

(Seal)

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

54 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—75010) • •

PRAECIPE FOR RECORD.

United States Board of Tax Appeals. Filed Jun 26, 1936.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
3. Opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Statement of the evidence as settled and allowed.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record not included in record.

7. This praecipe.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Service of a copy of the within praecipe is hereby admitted this 10th day of April, 1936.

CENTRAL REPUBLIC TRUST CO.,
WM. L. O'CONNELL, Receiver,
Attorney for Respondent.
By WM. J. FLAHERTY,
Attorney for Receiver.
By J. A. MCGEEAN.

In the presence of
WM. S. DELANEY,
Internal Revenue Agent.

 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—75010) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of July, 1936.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 46, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the nineteenth day of August, 1936, upon which the following entitled cause was heard and determined:

Commissioner of Internal Revenue,
Petitioner,

vs.

A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust No. 1523, Central Republic Trust Company, Formerly named Central Republic Bank and Trust Company, as successor Trustee by Consolidation,
Respondents,

No. 5970, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of January, A. D. 1937.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Commissioner of Internal Revenue
5970 *vs.*
A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust No. 1523, Central Republic Trust Company, Formerly named Central Republic Bank and Trust Company, as Successor Trustee by Consolidation.

Petition for Review of Decision of the United States Board of Tax Appeals.

And afterwards, to-wit: On the twenty-eighth day of July, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5970. October Term, 1935.

Commissioner of Internal Revenue

vs.

A. A. Lewis & Company, *et al.*

The Clerk will enter my appearance as counsel for Respondent.

HOWARD R. BRINTLINGER,
111 W. Washington St.
Chicago, Illinois.

Endorsed: Filed July 28, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the first day of August, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5970. October Term, 1935.

Commissioner of Internal Revenue

vs.

A. A. Lewis & Company, *et al.*

The Clerk will enter our appearance as counsel for Petitioner.

ROBERT H. JACKSON,
Asst. Attorney General,
SEWALL KEY,
Special Asst. to the Attorney General,
Washington, D. C.

Endorsed: Filed August 1, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-eighth day of August, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5970. October Term, 1935.

Commissioner of Internal Revenue

vs.

A. A. Lewis & Company, *et al.*

The Clerk will enter our appearance as counsel for Petitioner.

HERMAN OLIPHANT,
General Counsel, Department of the Treasury,
BYRON M. COON,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.

Endorsed: Filed August 28, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eighth day of September, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5970. October Term, 1935.

Commissioner of Internal Revenue

vs.

A. A. Lewis & Company, *et al.*

The Clerk will enter my appearance as counsel for Petitioner.

ELLIS N. SLACK,
Special Assistant to the Attorney General,
Washington, D. C.

Endorsed: Filed Sept. 8, 1936. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, 1936, of the October Term, in the year of our Lord one thousand nine hundred and thirty-six, and of our Independence the one hundred and sixty-first.

And afterwards, to-wit: On the eighteenth day of November, 1936, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 18, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Commissioner of Internal Revenue
5970 *vs.*
A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust No. 1523, Central Republic Trust Company, Formerly named Central Republic Bank and Trust Company, as Successor Trustee by Consolidation.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Ellis N. Slack, counsel for petitioner, and by Mr. Franz W. Castle, counsel for respondent.

On Consideration Whereof: It is now here ordered and adjudged by this court that the Decision entered in this cause on July 18, 1935, by the United States Board of Tax Appeals, be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 49 to 53, inclusive, contain a true copy of the proceedings had and papers filed (excepting Briefs of counsel) in the case of

Commissioner of Internal Revenue,

Petitioner,

vs.

A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust No. 1523, Central Republic Trust Company, Formerly named Central Republic Bank and Trust Company, as successor Trustee by Consolidation,

Respondents,

No. 5970, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of January, A. D. 1937.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 29, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FEB 18 1937

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1936.

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST No. 1923, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANZ W. CASTLE,
Attorney for Petitioners.

EMMETT J. McCARTHY,
HOWARD R. BRINTLINGER,
ROBERT F. CAREY,
Of Counsel.

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INDEX.

Subject Index.

Petition: PAGE

I. Summary Statement of Matters Involved.. 2

II. The Facts 2

III. Statutes Involved 5

IV. Decisions of United States Board of Tax Appeals and Circuit Court of Appeals of Seventh Circuit 5

V. Questions presented 6

VI. Reasons relied on for Allowance of Writ.. 6

Brief in Support of Petition..... 9

I. Opinions of Courts below..... 9

II. Jurisdiction 10

III. Statement of Case..... 10

IV. Specifications of Errors..... 10

V. Argument 10

VI. Conclusion 14

Citations.

Cases:

Morrissey v. Commissioner, 296 U. S. 344-356, 359-360 ..... 6, 10

Statutes:

Revenue Act of 1928, c. 852, 35 Stat. 791..... 5

Sec. 240-a of Judicial Code, U. S. C. A. title 28, Ch. 9, Sec. 347..... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. _____

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST No. 1923, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation, respectfully pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on the 18th day of November, 1936. (Record 53, not reported.)

I.

Summary statement of the matters involved.

The Commissioner of Internal Revenue, on January 3, 1934, levied a deficiency assessment against the petitioners in the amount of Five Hundred Twelve and 30/100 Dollars ($512.30) for income tax for the year 1931. These petitioners filed their petition in the United States Board of Tax Appeals on March 5, 1934, praying that the said deficiency assessment be rescinded.

On June 14, 1935, the United States Board of Tax Appeals filed a memorandum opinion (Record 36), and on July 13, 1935 entered a finding and judgment that there was no deficiency for the year 1931. (Record 39.)

The Commissioner of Internal Revenue, on October 14, 1936, filed a petition in the Circuit Court of Appeals for the Seventh Circuit, praying for a review of the decision of the Board of Tax Appeals and a reversal thereof.

Upon the 18th day of November, 1936, the Circuit Court of Appeals for the Seventh Circuit, entered an order reversing and remanding the cause to the Board of Tax Appeals, but without handing down any written opinion. (Record 53.)

II.

The facts.

On December 12, 1925, MINERVA S. MELIDONES, hereinafter called "Grantor", entered into two agreements respecting certain real estate owned by her in the Village of Niles Center, Cook County, Illinois. One of the agree-

ments, designated "Declaration of Trust", provided for the placing of title in the Chicago Trust Company of Chicago, (predecessor of Central Republic Trust Company) as Trustee, for the "ultimate use and benefit of" the grantor, and A. A. Lewis, as their interest should appear from the agreement attached to said declaration of trust. The trust so created was known as Trust No. 1523.

The trust agreement provided that while the Trustee had full power to deal with the real estate so far as the public was concerned, it was agreed by the parties that it would do so only in accordance with the provisions of the said agreement attached thereto.

The said agreement so attached to the trust agreement, was of even date therewith, and also executed by the Grantor and by the said A. A. Lewis, and the said Trustee. Lewis was an experienced real estate man, who specialized in the subdivision of land in the vicinity of Niles Center, Illinois. Under the agreement, Lewis was appointed exclusive selling agent of the land which should be subdivided in lots, the Grantor, however, reserving the right to withdraw any of the property from the operation of the trust agreement after nine months from the date thereof. The Grantor appointed Lewis "Manager of the Trust." The Grantor delegated Lewis "such power and duties in connection with the administration of the trust as may be necessary to facilitate the sale of the land." He was also given exclusive possession of the property during the continuance of the trust and was given power to give directions to the Trustee for the conveyance of any lot sold and paid for.

Among the powers specifically delegated to Lewis were the following: To exercise management and control of

the trust property for the purpose of selling it; to employ at his own expense a sales organization; to select and approve purchasers for the lots, both as to character and financial responsibility, and to request the Trustee to execute deeds and other instruments. Lewis agreed, at his own expense, to advertise the property for sale. As sole compensation for his services, Lewis was to receive a specified cash commission, based upon the price of lots sold.

The initial payment on each contract up to the amount of Lewis' commission, was to be retained by him. All subsequent payments were to be collected by the Trustee, who was to receive 3½% of collections made by it. All costs of surveying and subdivision fees and collection, expense of putting the real estate in shape for sale and of laying down of cement sidewalks, were to be borne by the grantor. All other expenses of sale, including compensation of salesmen, were to be paid by said Lewis out of the agreed commission.

The duties of the Trustee, as specified in the Declaration of Trust and attached agreement, were as follows: To hold title to the real estate; to issue certificates of beneficial interest; to deal with said real estate on written direction of the Grantor, and, under certain circumstances, of the said Lewis, to execute contracts to purchasers when directed so to do by said Lewis; to consent to assignments of contracts at the direction of said Lewis; to collect payments on contracts subsequent to the down-payment and to disburse all money received under the provision of the agreement; to keep books of account and to retain compensation from the amounts collected.

The Central Republic Trust Company afterwards be-

came Successor in Trust through the consolidation of the Chicago Trust Company with it.

The said Minerva S. Melidones was the owner of the property at the time of the formation of the trust. Her interest was thereafter assigned to Benjamin Swartz, and his estate is the sole beneficiary. No other persons than the above were at any time beneficiaries in the trust.

STATUTES INVOLVED.

III.

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

SEC. 701. DEFINITIONS.

(a) When used in this Act—

• • • • •

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C. A., Title 26, Sec. 1696.)

IV.

Decisions of the United States Board of Tax Appeals and Circuit Court of Appeals of the Seventh Circuit.

The United States Board of Tax Appeals found that there was no deficiency in income tax for the year 1931, the year for which a deficiency assessment was levied by the Commissioner of Internal Revenue. (Record 38.)

The Circuit Court of Appeals of the Seventh Circuit entered an order at the closing of the oral argument, reversing the decision of the Board of Tax Appeals

(Record 52) stating verbally from the bench, that in the opinion of the Court, the decision of the case was controlled by the decision of the Supreme Court of the United States in the case of *Morrissey* v. *Commissioner*, 296 U. S. 344.

V.

Question presented.

Whether the trust in question is an "association" within the meaning of Sec. 701 (a) (2) of the Revenue Act of 1928 and is hence taxable as a corporation.

VI.

Reason relied on for allowance of writ.

Petitioners believe that the writ of certiorari should be granted because:

(1) The case presents the following questions of law which have not been previously passed on by this Court:

(a) Whether a trust in which the beneficiary is not immune from liability can be considered an "association".

(b) Whether a trust in which there is no trustee or committee having powers of doing business analagous to a board of directors of a corporation can be considered an "association".

(c) Whether a trust in which there is a single beneficiary can be considered an "association".

(b) Whether a trust which is not of the business or Massachusetts type can be considered an "association".

(2) The trust involved in this case is representative of a large number of trusts which are not of the business or Massachusetts type, and the decision of this case will obviate much future litigation.

Wherefore, it is respectfully prayed that this petition for writ of certiorari be granted.

.....

FRANZ W. CASTLE,
Attorney for Petitioners.

EMMETT J. MCCARTHY,
HOWARD R. BRINTLINGER,
ROBERT F. CAREY,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. _____

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST No. 1923, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions of courts below.

The findings of fact, conclusions of law and judgment of the United States Board of Tax Appeals are set out in the Record at pages 36, 37 and 38 and are not reported.

The opinion of the Circuit Court of Appeals of the Seventh Circuit is found in the Record on page 53 and is not reported.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered November 18, 1936. (Record 53.)

The jurisdiction of this Court is invoked to review the cause by writ of certiorari under Section 240 (a) of the Judicial Code (U. S. C. A., Title 28, Chapter 9, Sec. 347), providing for the granting of a writ of certiorari by this Court to review a final judgment or decree of a Circuit Court of Appeals of the United States.

III.

Statement of the case.

A statement of the case is set out in the foregoing petition under caption "Summary Statement of Matters Involved" and the "Facts" to which references are hereby made.

IV.

Specifications of errors.

The Circuit Court of Appeals of the Seventh Circuit erred in reversing the decision of the United States Board of Tax Appeals.

V.

Argument.

The congress saw fit to provide in the Revenue Act that "associations" should be taxed as corporations without defining the exact meaning of the word "associa-

tions". Much confusion has arisen in adjudicated cases arising under the Act, although the decision by this Court of the case of *Morrissey* v. *Commissioner,* 296 U. S. 344, and of the other three cases decided at the same time has done much to clarify the situation. However, in all of the cases which have been before this Court for decision, the trusts involved have been of the business or Massachusetts type, which type has been carefully developed to possess and exercise all the advantages of the corporate form of organization, and to avoid all the burdens incidental thereto. It seems fair to assume that it was the purpose of Congress to compel such organizations to assume responsibilities which are commensurate with the advantages and immunities secured by them by aping the corporate form of organization.

This Court, therefore, has not had an opportunity to lay down authoritatively the line of distinction which seemed to be suggested in the opinion of Chief Justice Hughes in the *Morrissey case, supra,* where, on page 360 of the opinion, the following statement appears:

> "• • • trusts that thus satisfy the primary conception of associations and have the attributes to which we have referred *distinguishing them from partnerships.*" (Italics ours.)

From the above language, and also from the statement of salient features of trusts which are to be considered associations contained in the paragraph of said opinion immediately preceding the one from which the above exerpt is quoted, the petitioners have concluded that a trust in which the beneficiaries remain personally liable as individuals or as partners, is not to be considered an association.

In the instant case, Minerva S. Melidones, the original

owner of the real estate in question, continued to be liable for any action of her agent, Albert A. Lewis, in connection with the subdivision and sale of the real estate. The attention of the Court is directed to the language of the sales agreement. In the inducement (Record 19), the following language appears:

> "And, Whereas, the said party of the first part (Melidones) is desirous of securing the services of the party of the second part (Lewis) in selling the lots in said subdivision. * * *" (Parentheses ours.)

And gain in Article I (Record 20):

> "The party of the first part does hereby constitute the party of the second part * * * exclusive sales agent of said property."

This brings us to the consideration of the real nature of the arrangement effected by the documents executed by the three interested parties, to-wit, the owner, the sales agent and the trustee. (Record 13 to 26.) Stripped of all non-essentials, the facts emerge as follows: A woman owned real estate; she employed an experienced subdivider to subdivide and to sell it, agreeing to pay a fixed commission on the lots sold out of which the subdivider was to pay all advertising and sales costs. Simultaneously with the execution of the sales agreement, she put the title in trust under standard printed form of land title trust, under the terms of which the trustee agreed to hold the title subject to the order of the owner and sales agent. The Trustee was given no discretionary powers whatever and no attempt was made to secure to the sole beneficiary immunity from liability.

It seems to the petitioners that the arrangement thus effected lacks at least four of the essentials of "associations" as stated in the *Morrissey* case in the following language:

First: "The designation of trustees, who are charged with the conduct of an enterprise—who act 'in much the same manner as directors.'" (p. 359.)

Second: "The trust method also permits the limitation of the personal liability of participants embarked in the undertaking." (p. 359.)

Third: "'Association' implied associates." (p. 356.)

It seems clear that the trust was merely a security device whereby the title was protected from the vicissitudes from which it would have been subject, had it remained in the original owner. Purchasers of lots on deferred payments may not have been able to obtain title, had it not been put in a neutral third party. In other words, the trust was merely an incidental feature of the plan. This trust is representative of a large number of trusts which are not trusts of the Massachusetts type but are incidental to business enterprises.

The Treasury Regulations applicable to the subject matter are conflicting, as set forth in the *Morrissey* case. (p. 356.) The Commissioner of Internal Revenue seems to consider that if a trust is in any way connected with a business enterprise, an association *ipso facto* results. In the present state of the law, the Trustees and beneficiaries in such trusts are uncertain as to their status and much confusion has resulted and much litigation will result unless the distinction suggested in the *Morrissey* case is translated into authoritative language of the court. The attorneys whose names are subscribed to this petition have two similar cases now pending in the Circuit Court of Appeals of the Seventh Circuit.

The Circuit Court of Appeals did not render any opinion, but at the closing of the oral argument entered an order reversing the judgment of the United States Board

of Tax Appeals. The Chief Justice, in behalf of the Court, stated orally from the bench, that in the judgment of the Court the decision of the Supreme Court of the United States in the *Morrissey case, supra,* was conclusive and necessitated the reversal of the judgment.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities demonstrates that the decision of the Circuit Court of Appeals is erroneous. It is earnestly urged in the interest of further clarification and settlement of the law upon the issues involved that this Honorable Court entertain a review of this case on writ of certiorari, and it is respectfully submitted, in the light of the reasons indicated, that the petition should be granted.

FRANZ W. CASTLE,
Attorney for Petitioners.

EMMETT J. MCCARTHY,
HOWARD R. BRINTLINGER,
ROBERT F. CAREY,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, A. D. 1936

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

FRANZ W. CASTLE,
Attorney for Petitioners.

EMMETT J. McCARTHY,
HOWARD R. BRINTLINGER,
ROBERT F. CAREY,
Of Counsel.

INDEX.

	PAGE
Opinions and Judgment Below	1
Jurisdiction	2
Statement of Case	2
Statutes Involved	5
Specification of Errors	5
Question Presented	5
Summary of Argument	6
Argument	7
Conclusion	14

CITATIONS.

CASES:

Morrissey vs. Commissioner, 296 U. S. 344	7-8-12-13
Hecht vs. Malley, 265 U. S. 144	8
Beilin vs. Krenn & Dato, 350 Ill. 284	10

STATUTES:

Revenue Act of 1928, C852, 45 Stat. 791, Sec. 701 (U. S. C. Title 26, Sec. 1696)	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1936

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

I.

OPINIONS AND JUDGMENT BELOW.

The judgment order of the Circuit Court of Appeals reversing the decision of the United States Board of Tax Appeals appears on page 53 of the Record. No opinion was handed down. The Board of Tax Appeals rendered a memorandum opinion (R. 36-38) which is not officially reported.

II.

JURISDICTION.

This case is before this court on a writ of certiorari granted March 29, 1937 to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, which reversed the decision of the United States Board of Tax Appeals, disallowing deficiency income tax assessment for the year 1931.

III.

STATEMENT OF CASE.

On December 12, 1925, Minerva S. Melidones, hereinafter called "Grantor," entered into two agreements respecting certain real estate owned by her in the Village of Niles Center, Cook County, Illinois. One of the agreements designated "Declaration of Trust" (R. 13-17) provided for the placing of the title to said real estate in the Chicago Trust Company of Chicago (predecessor of Central Republic Trust Company) as Trustee for the "ultimate use and benefit of" the Grantor and A. A. Lewis as their interests should appear from the agreement attached to said declarations of trust. The trust so created was known as Trust No. 1523 and the Declaration of Trust in question was upon the printed form bearing the imprint of said Trust Company.

The said declaration of trust provided that while the Trustee had full power to deal with the real estate so far as the public was concerned, it was agreed by the parties that it would do so only in accordance with the provisions of the said agreement attached thereto. It also provided

(R. 15) that the beneficiary should have the management and control of the trust property and of the selling, renting and handling thereof. The said agreement (R. 17-34) so attached to the trust agreement and containing provisions relative to the sale of the property was of even date therewith, and was executed by the Grantor, the sales agent A. A. Lewis, and the said Trustee. Lewis was an experienced real estate man who specialized in the subdivision of land in the vicinity of Niles Center, Illinois. Under the agreement (R. 22) Lewis was appointed by the Grantor exclusive selling agent of the land which was to be subdivided, the Grantor, however, reserving the right (R. 30) to withdraw any unsold property from the operation of the sales agreement after nine months from the date thereof. The Grantor appointed Lewis "Manager of the Trust" (R. 22). The Grantor delegated to Lewis "such power and duties in connection with the administration of the Trust as may be necessary to facilitate the sale of the land." He was also given exclusive possession of the property during the continuance of the sales arrangement (R. 41) and was given power to direct the Trustee to issue conveyances of any lots sold and paid for.

Among the powers specifically delegated to Lewis were the following: (R. 23-24) To exercise management and control of the trust property for the purpose of selling it, to employ at his own expense a sales organization, select and approve purchasers for the lots, both as to character and financial responsibility and to request the Trustee to execute deeds and other instruments. Lewis agreed at his own expense to advertise the property for sale (R. 27) and as sole compensation for his services was to receive a specified cash commission, based upon the price of the lots sold (R. 29).

The initial payment on each contract up to the amount of Lewis' commission was to be retained by him to apply on

his commission. All subsequent payments were to be collected by the Trustee who was to retain for its compensation 3½% of collections made by it. All costs of surveying, expense of putting real estate in shape for sale, expense of laying down cement sidewalks, and Trustee's fees were to be borne by the Grantor (R. 30). All expenses of sale, including compensation of salesmen were to be paid by said Lewis out of his agreed commission (R. 31).

The duties of the Trustee, as specified in the Declaration of Trust (R. 13) and attached agreement (R. 32) were as follows: To hold title to the real estate; to issue certificates of beneficial interest; to deal with said real estate on written direction of the Grantor and under certain circumstances, of the said Lewis; to execute contracts to purchasers when directed to do so by said Lewis; to consent to assignments of contracts at the direction of said Lewis; to collect payments on contracts subsequent to the down-payment, and to disburse all moneys received under the provisions of the agreement; to keep books of account and to retain its compensation from the amounts so collected. The Central Republic Trust Company afterwards became successor in trust through the consolidation of the Chicago Trust Company with it.

The said Minerva S. Melidones was the owner of the property at the time of the formation of the trust. Her interest was assigned to Benjamin Swartz and his estate is the sole beneficiary. No other persons than the above were at any time beneficiaries under the trust (R. 9).

IV.

STATUTES INVOLVED.

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

Sec. 701. Definitions.

(*a*) When used in this Act—.

• • • • •

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C. Title 26, Sec. 1696).

V.

SPECIFICATION OF ERRORS.

The only error to be argued is that the Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

VI.

THE QUESTION PRESENTED.

Whether the trust in question is an "Association" within the meaning of Section 701 (*a*) (2) of the Revenue Act of 1928 and hence taxable as a corporation.

VII.

SUMMARY OF ARGUMENT.

The argument will be presented under the following subdivisions:

1. The Trust was not engaged in a business enterprise for profit.
   (*a*) The trustee was given no discretionary powers.
   (*b*) The sales agent was appointed by the Grantor and was at all times under her control.
2. The Trust is not *quasi* corporate in form.
   (*a*) The beneficiary of the Trust was not immune from liability.
   (*b*) There was no Trustee or Committee having powers of doing business analogous to a Board of Directors of a corporation.
   (*c*) The Trust was not of the business or Massachusetts type.
3. The Trust has but a single beneficiary.
4. Conclusion.

VIII.

ARGUMENT.

We assume at the outset that if it were not for the trust feature involved in the instant case, no contention would be made by the Commissioner of Internal Revenue that a taxable "association" existed. Lacking the trust feature, there would have been a simple subdivision and sale of lots by a single owner through an agent. Therefore, the question involved would seem to be narrowed down to an answer to the query: "Did the addition of the trust feature result in the formation of an 'association' in the meaning of the Revenue Act?"

When this case was argued before the Circuit Court of Appeals for the Seventh District, it was apparent that both the Petitioners and Respondents relied largely upon the decision of this court in the case of *Morrissey* v. *Commissioner*, 296 U. S. 344, as being decisive of the issue involved. The Petitioner there (Respondent here) contended that the facts in this case brought it squarely within the definition of "association" as laid down in the *Morrissey* case, while the Respondents there (Petitioners here) contended that the facts of the instant case left it clearly outside the definition of an "association" as there laid down.

It seems to us that a situation is here presented different from that presented in any of the cases previously decided by this court. It is apparent, from a study of those cases, that the trusts involved were of the Massachusetts type, or at least of a type very similar thereto. Inasmuch as this type of trust was developed for the express purpose of obtaining the advantages inherent in the corporate form of organization without incurring the burdens incidental thereto, it probably appeared reasonable to Congress to subject trusts of that type to the same requirements as corpora-

tions so far as payment of revenue to the Federal government was concerned, putting into effect the old adage, "Let the tail follow the hide."

Here, however, is a trust which is lacking in many of the features characteristic of and necessary to a Massachusetts trust, and the question arises whether it was the intention of Congress that a trust of this type be considered an "association."

Prior to the decision of the *Morrissey* case, this court in its opinion in the case of *Hecht* v. *Malley*, 265 U. S. 144, had enunciated the principle that a trust, to be considered an "association," must have two fundamental characteristics: First, it must be engaged in carrying on a business enterprise; Second, it must have a *quasi* corporate organization,

This brings us to the consideration of the first point stated in our summary:

THE TRUST WAS NOT ENGAGED IN A BUSINESS ENTERPRISE FOR PROFIT.

It is apparent that Minerva S. Melidones was engaged in the business of subdividing and selling her real estate through an agent of her own appointment. Does it necessarily follow, however, that the trust was "engaged in carrying on a business enterprise," as prescribed in the case of *Hecht* v. *Malley*, (*supra*) or "maintained as a medium for the carrying on of a business enterprise and sharing its gains," as stated in the *Morrissey* case, (*supra*)?

In one sense, any person or agency participating in any way in a business enterprise can be said to be "engaged" in it. In this very narrow sense it might be said that a salesman employed by the sales agent was "engaged in"

the business of selling the real estate in question. It seems apparent, however, that the language used in the two leading cases above referred to and set out in the excerpts quoted was not intended in that narrow signification. It was intended, it seems to us, to signify ultimate responsibility for management and direction of a business enterprise. In the familiar type of a business or Massachusetts trust, the power to manage and direct the business (or to mismanage it to its ruin in some cases) is explicitly vested in the trustees of the organization.

But the trustee in the trust here presented had no such power. Its powers were entirely ministerial and involved the exercise of no discretion whatever. They were the powers which are ordinarily conferred upon trustees in naked land title holding trusts with the addition that the trustee here was authorized to make collections upon contracts and to distribute same according to specific provisions of the sales contract.

The powers contained in the Declaration of Trust (R. 13) were entirely controled by the following provisions (R. 15):

> "• • • it is understood and agreed by the parties hereto and by any person who may hereafter become a party hereto, that said Chicago Trust Company will deal with it only when authorized to do so in writing, and then it will on the written direction of (in accordance with the attached agreement) or on the written direction of said person or persons as may be beneficiary • • • at the time • • •." (Parentheses are ours, but indicate wording which was written in typewriting in the printed form of the Declaration of Trust.)

And also (R. 15):

> "The beneficiary or beneficiaries hereunder shall have the management and control of said property and of the selling, renting and handling thereof. • • • "

The powers of the trustee contained in the sales agreement are shown principally in Sections 2 to 7 inclusive in Article VIII of the agreement, (R. 32 and 33) and relate to the collection of deferred payments upon contracts, the distribution of same and the keeping of books and records.

It will be observed that the trustee had nothing to do with the sale of lots, the procuring of purchasers, or passing upon their eligibility. The provision for a commission of only 3½% of collections to the trustee would in itself serve to confirm the contention that the trustee was not expected to exercise any but ministerial duties.

It is true that very broad powers were exercised by A. A. Lewis, the sales agent, but it will be apparent from inspection of the contract that the sales agent was appointed by the beneficiary and not by the trustee. In the inducement to the contract (R. 19), the following language appears:

> "And, Whereas, the said party of the first part (Melidones) is desirous of securing the services of the party of the second part (Lewis) in selling the lots in said subdivision. • • • " (Parentheses ours.)

And again in Article I (R. 20):

> "The party of the first part does hereby constitute the party of the second part • • • exclusive sales agent of said property."

In further confirmation of our contention that the beneficiary and not the trust was engaged in a business enterprise, we desire to cite the case of *Beilin* v. *Krenn & Dato*, 350 Ill. 284. In that case the owner of the property, corresponding to Minerva S. Melidones in the instant case, was itself a business trust. The title to the real estate was placed in a land title trust almost exactly corresponding in its terms to the trust here in question. The Court held that the beneficiary was the one actually engaged in the sale of the subdivided property and liable upon all con-

tracts entered into by the sales agent, who was denominated "Manager" as in the instant case.

What then was the function of the trustee in the business enterprise in question here? Principally that of an escrowee. By the device of placing title in a trustee, the sales agent was protected from the refusal by, or inability of, the principal to carry out the terms of the sales agreement; the purchasers of lots upon deferred payments were assured that the title would be protected from the viscissitudes to which it might be subject in the hands of the owner, and available for transfer to them upon completion by them of the payments due on their contracts; the holders of encumbrances upon the property were assured that the money received from the sale of lots would be applied in reduction of their encumbrances. All of these functions of the trustee were of a fiduciary nature and we submit could not be considered as the carrying on of a real estate sales business.

It is apparent that the powers and duties of the trustee in this trust were totally different from the powers and duties of the trustees in the trusts which have been previously passed upon by this court in the cases adjudicated by it.

THE TRUST IS NOT QUASI CORPORATE IN FORM.

There can be no question but that the trust form of organization has certain inherent resemblances to the corporate form. We conceive, however, that a valid distinction may be drawn between resemblances which are inherent in the bare nature of the trust form and those which arise out of the fact that the trust has been shaped and adapted to resemble the corporate form as closely as possible. The business or Massachusetts trust is of course illustrative of the type last referred to. This type is designed primarily for the purpose of the carrying on of business enterprises

and possesses all of the salient features enumerated on page 359 of the opinion in the *Morrissey* case (*supra*).

In most of such trusts the powers of the trustees are much greater than those possessed by the directors of corporations. Corporate directors are practically always elected by stockholders at regular intervals, and hold their position securely only in the intervals between stockholders' meetings. On the other hand, in nearly all of the trusts of the business type, the trustees are a self-perpetuating board and are not subject to control by the beneficiaries of the trust. They exercise not only the powers of directors but of officers as well in many instances.

As a general proposition, beneficiaries in business trusts are not personally liable beyond the assets embarked in the undertaking, although in some of the states this immunity has been refused. In trusts of this type, the trustees deal at arm's length with the parties on the other side of the transaction. They owe no duties to opposing parties, except such duties as the law imposes on all persons in a similar transaction. If they could be said to act in a fiduciary relationship, such relationship could apply only to their own beneficiaries.

The trust here considered has the resemblances to the corporate form which are inherent in its nature as a trust, but none which arise from an attempt to make it serve the purposes and obtain the immunities of the corporate form of organization. Inasmuch as there is a single beneficiary, the use of a trust could afford no benefit in the way of centralization of power. No trustees were named who were charged with the conduct of the enterprise—who were to act "in much the same manner as directors." No attempt was made to limit the liability of the beneficiary to the property embarked in the undertaking. In other words, this trust is not of the highly technical and conventional type carefully and painstakingly worked out by skilled lawyers

seeking for a loop-hole by which statutory regulations and taxes might be avoided, but arises out of an effort to safeguard the parties interested from different angles in the same transaction by the introduction of a disinterested outsider qualified by law and experience to serve in a fiduciary capacity for the benefit of all interested parties.

We do not understand that the quality of being "quasi corporate" is wholly dependent upon the possession of any one characteristic, although the use of the words "distinguishing them from partnerships" appearing on page 360 of the opinion in the *Morrissey* case, (*supra*), would seem to indicate that the liability of the beneficiaries beyond the property embarked in the undertaking is of considerable importance.

In the final determination of the question whether a given trust is a *quasi* corporation, it would seem that not only its form but its purpose is important. Here the purpose was entirely that of furnishing protection to the different parties rather than of obtaining immunities by aping a corporate structure.

THE TRUST HAS BUT A SINGLE BENEFICIARY.

In considering the meaning of the word "association," in his opinion in the *Morrissey* case, Chief Justice Hughes on page 356 says:

> "'Association' implies associates. It implies the entering into of a joint enterprise • • • ."

The New Century Dictionary defines the word "associate" as "A companion; comrade or mate; a partner or ally; a colleague."

It would seem to us apparent that associates must have some common interest in the enterprise, either as trustees exercising broad powers to carry on a business, or as joint

beneficiaries of a trust. We have not been able to find a adjudicated case where an association was declared t exist in which was lacking plurality of trustees or in th number of beneficiaries.

Respondents made the following claim in the petition fo appeal filed by him in the Circuit Court of Appeals (R. 41) "The above described trust is an organization composed o 'beneficiaries' and 'agent' and 'a trustee' • • •."

The contention that an agent is also an associate doe not seem tenable. If the agent be eliminated as an associat it would leave only the sole beneficiary and the truste It is apparent from the reading of the agreement that th trustee had no joint interest in the transaction with the so beneficiary. Its duty was in the nature of agency rath than participation in a joint enterprise. It could not, und any circumstances, share in any joint profits derived fro the enterprise.

CONCLUSION

We submit that there is a very vital distinction betwe the type of trusts in question in all of the previous cas decided by this court and the trust in question here, an respectfully ask that the decision of the Circuit Court Appeals of the Seventh District, reversing the decision the Board of Tax Appeals be reversed by this court.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	4
Argument	7
Conclusion	12

CITATIONS

Cases:	
Helvering v. *Coleman-Gilbert*, 296 U. S. 369	7, 10
Helvering v. *Combs*, 296 U. S. 365	7, 8
Morrissey v. *Commissioner*, 296 U. S. 344	7, 10, 11, 12
Swanson v. *Commissioner*, 296 U. S. 362	7, 10
Statute:	
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 701 (U. S. C., Title 26, Sec. 1696)	2
Miscellaneous:	
Treasury Regulations 74:	
Art. 1312	2
Art. 1314	3

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC TRUST COMPANY, FORMERLY NAMED CENTRAL REPUBLIC BANK AND TRUST COMPANY, AS SUCCESSOR TRUSTEE BY CONSOLIDATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 36–38) is unreported. The Circuit Court of Appeals reversed the decision of the Board without written opinion (R. 53).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 18, 1936 (R. 53). The petition for a writ of certiorari was filed February 18, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trust in question is an "association" within the meaning of Section 701 (a) (2) of the Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

> SEC. 701. DEFINITIONS.
>
> (a) When used in this Act—
>
> * * * * *
>
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C., Title 26, Sec. 1696.)
>
> * * * * * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 1312. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws,

agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 701.

ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 701. Even in the absence of any control by the beneficiaries, where the trustees are not re-

stricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

STATEMENT

The facts may be summarized as follows (R. 8–38):

On December 12, 1925, one Minerva S. Melidones was the owner of certain undeveloped real estate, and on that date, for the purpose of subdividing and selling the same, she entered into two written agreements affecting the property (R. 36). One of the agreements, designated "Declaration of Trust", provided for the placing of title in the Chicago Trust Company (predecessor of Central Republic Trust Company) as trustee for the ultimate use and benefit of herself and one A. A. Lewis, as beneficiaries. The trust so created was known as Trust Number 1523. (R. 13–36.)

The pertinent provisions of the trust instrument may be summarized as follows: That the trustee will hold the property and the proceeds, profits, and avails thereof for the use and benefit of the beneficiaries; that it is agreed among the parties and by any persons who may become entitled to any interest under the trust that the interests of the beneficiaries shall consist solely of a power of

direction to deal with the title to the property and the right to receive the proceeds from rentals or from sales; that such right in the avails of the property shall be deemed to be personal property and may be assigned and transferred as such; that it was the intention of the parties to vest full legal and equitable title in the trustee; that the trustee is sole owner of the property, and so far as the public is concerned has full power to deal with it, but that it is understood and agreed by the parties and any persons who may hereafter become parties to the agreement that the trustee in dealing with the title to the property will follow the directions of the trust manager or such persons as may be beneficiaries at the time; that transferable certificates evidencing the interests of the beneficiaries may be issued by the trustee, and that thereafter valid assignments of beneficial interests may only be had by surrender of old certificates of interest to the trustee and issuance of new certificates in exchange by the trustee; that if any property remains in the trust twenty years from date, it shall be sold at public sale by the trustee and the proceeds divided among the beneficiaries, and that the trustee was entitled to reasonable compensation for any special services rendered it or for taking and holding any other property thereafter deeded to it. (R. 13–17.)

Under an agreement which was attached to the trust instrument and which was executed by the

beneficiaries and the trustee, Lewis was appointed "manager of the trust" and was granted "such powers and duties in connection with the administration of said trust as may be necessary to facilitate the sale of said land." (R. 22–23.) The agreement was made irrevocable for a defined period (R. 22), and Lewis was given a specific interest in all sales contracts (R. 32). Among the powers specifically delegated were the following: To exercise management and control of the trust property for the purpose of selling it; to employ, at his own expense, a sales organization; to select and approve purchasers for the lots, both as to character and financial responsibility, and to enter into contracts with the purchasers in the name of the trust as "manager" of said trust; to request the trustee to execute deeds and other necessary instruments. The trustee agreed to convey title to purchasers of lots upon the written direction of Lewis. (R. 17–36, 37.)

The agreement provided that it should not be construed as creating a partnership, and that it should not be placed of record. (R. 33.)

The Board of Tax Appeals held that the trust was not an association within the meaning of Section 701 (a) (2) of the Revenue Act of 1928. (R. 36–38.) This action was reversed by the Circuit Court of Appeals, on the authority of *Morrissey* v. *Commissioner*, 296 U. S. 344, which had been decided subsequent to the decision of the Board of Tax Appeals. (R. 53.)

ARGUMENT

The sole question presented herein is whether the trust in question is an "association" within the meaning of Section 701 (a) (2) of the Revenue Act of 1928, *supra*, p. 2, and hence is to be taxed as a corporation. That section defines a corporation as including "associations, joint-stock companies, and insurance companies," but the term "association" is not defined.

The question of what constitutes an "association" within the meaning of the various revenue acts has now been definitely settled by the opinions of this Court in *Morrissey* v. *Commissioner*, 296 U. S. 344; *Helvering* v. *Coleman-Gilbert*, 296 U. S. 369; *Helvering* v. *Combs*, 296 U. S. 365; and *Swanson* v. *Commissioner*, 296 U. S. 362. In the *Morrissey* case, this Court said in part (pp. 358, 360):

> While the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive. Thus an association may not have "directors" or "officers", but the "trustees" may function "in much the same manner as the directors in a corporation" for the purpose of carrying on the enterprise. The regulatory provisions of the trust instrument may take the place of "by-laws." * * *
>
> * * * * *
>
> Applying these principles to the instant case, we are of the opinion that the trust

> constituted an association. The trust was created for the development of a tract of land through the construction and operation of golf courses, club houses, etc. and the conduct of incidental businesses, with broad powers for the purchase, operation and sale of properties. Provision was made for the issue of shares of beneficial interests, with described rights and priorities. There were to be preferred shares of the value of $100 each and common shares of no par value. Thus those who took beneficial interests became shareholders in the common undertaking to be conducted for their profit according to the terms of the arrangement. They were not the less associated in that undertaking because the arrangement vested the management and control in the trustees. *And the contemplated development of the tract of land held at the outset, even if other properties were not acquired, involved what was essentially a business enterprise. The arrangement provided for centralized control, continuity, and limited liability, and the analogy to corporate organization was carried still further by the provision for the issue of transferable certificates.* [Italics supplied.]

And in the *Combs* case it was said (pp. 368–369):

> The parties joined in a common enterprise for the transaction of business, and the beneficiaries who contributed money for that purpose became associated in the enterprise according to the terms of the arrangement.

> The essential features of the enterprise were not affected by the fact that the parties confined their operations to one oil well. See *Swanson* v. *Commissioner, ante,* p. 362. Parties may form an association for a small business as well as for a large one. Here, through the medium of a trust the parties secured centralized management of their enterprise, and its continuity during the trust term without termination or interruption by death or changes in the ownership of interests, and with limited liability and transferable beneficial interests evidenced by certificates. Entering into a joint undertaking they avoided the characteristic responsibilities of partners and secured advantages analogous to those which pertain to corporate organization. The fact that meetings were not held or that particular forms of corporate procedure were absent is not controlling.

The facts in the instant case bring it squarely within the rules enunciated by this Court in the above cases. The business enterprise here was to sell and rent lots in a real estate subdivision for a profit (R. 15–16, 19). Administrative control was effectively centered in Lewis. He managed and controlled the trust property for the purpose of carrying on the business. (R. 22–23.) The beneficiaries reserved a power to direct the disposition of the trust property (R. 15), subject, of course, to the irrevocable period of the agreement with

Lewis (R. 22). Such reservation of power in the beneficiaries makes even clearer the existence of an "association". Cf. *Morrissey* v. *Commissioner*, 296 U. S. 344, 349–354.

A provision was made for continuity in the office of trustee (R. 34), and was availed of at least once. (R. 4, 9). The interests of the beneficiaries to receive the proceeds from rentals or sales were made personal property and assignable as such (R. 14). It was contemplated that others might join in the enterprise (R. 13, 15). Indeed, the trust agreement provided for the issuance of transferable certificates "to evidence the interests of the beneficiaries", which were, in effect, to be transferred on the books of the trustee (R. 14). Continuity of existence was thus carefully provided for, although the venture did not prosper (R. 3, 6, 7), and, so far as it appears from the record, no certificates of participation were issued (R. 9). However, under recent decisions of this Court, it is immaterial that there may never have been more than three parties (Lewis, one other beneficiary, and the trustee) interested in the business at any one time. *Swanson* v. *Commissioner*, 296 U. S. 362, 365; *Helvering* v. *Coleman-Gilbert*, 296 U. S. 369, 372, 373–374.

Sole ownership of the property was in the trustee and, so far as the public was concerned, he had full power to deal with it (R. 15). The sole right to possession of the trust property was in Lewis, the manager of the trust (R. 26). The benefici-

aries recognized that certain payments and expenses must be borne should they desire the trustee and Lewis to continue the business (R. 14–15, 16, 31), but no liability on the part of the beneficiaries to the general public was recognized. It was specifically provided that the agreement between Melidones, the original owner of the property, Lewis, and the trustee should not be construed as creating a partnership, and should not be placed of record (R. 33). The trust set-up as set forth immunized the general fortunes of the trustee and the beneficiaries from general liability to the public. See *Morrissey* v. *Commissioner*, 296 U. S. 344, 359.

Thus the trust device of the parties here secured for this enterprise the substantial corporate advantages of centralized management, continuity and limited liability. Every test as laid down by this Court in the recent cases cited (p. 7, *supra*) is met. We do not believe that under the rules enunciated in those cases, it is material to determine whether the trust here, or the trusts there found to be "associations", were technically "Massachusetts Business Trusts." There are, of course, immaterial differences between the trust agreement here and the trust agreements involved in the *Morrissey* case and its companion cases (p. 7, *supra*), but, as this Court has recognized, "it is impossible in the nature of things to translate the statutory concept of 'association' into a particu-

larity of detail that would fix the status of every sort of enterprise or organization which ingenuity may create." *Morrissey* v. *Commissioner*, 296 U. S. 344, 356. Viewed in this aspect, no question of unsettled law, important or otherwise, is here presented.

CONCLUSION

The decision below is in harmony with the recent pronouncements of this Court. The question presented has been definitely settled and no conflict of decisions exists. The petition should be denied.

Respectfully submitted.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	5
Argument:	
I. The trust meets all the essential tests of an association laid down in the recent decisions of this Court	6
II. The trust cannot escape taxation as an association on the ground that there is but one trustee and one beneficiary	17
Conclusion	22
Appendix	23

CITATIONS

Cases:	
Burk-Waggoner Assn. v. *Hopkins*, 269 U. S. 110	16
Crocker v. *Malley*, 249 U. S. 223	6, 10, 17
Harris v. *United States*, 51 F. (2d) 382	18
Hecht v. *Malley*, 265 U. S. 144	6, 10, 16
Helvering v. *Coleman-Gilbert*, 296 U. S. 369	7, 8, 13, 18, 20, 21, 22
Helvering v. *Combs*, 296 U. S. 365	7, 9, 15, 16
Illeson v. *Anderson*, 67 F. (2d) 323	19
Morrissey v. *Commissioner*, 296 U. S. 344	5, 7, 8, 12, 15, 17, 19, 20
Pickering v. *Alyea-Nichols Co.*, 21 F. (2d) 501, certiorari denied, 276 U. S. 617	18
Swanson v. *Commissioner*, 296 U. S. 362	7, 8, 13, 20, 21
Trust No. 5833, Security First National Bank v. *Welch*, 54 F. (2d) 323, certiorari denied, 286 U. S. 544	18
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9	12
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 701	23
Sec. 704 (b)	18
Revenue Act of 1932, c. 209, 47 Stat. 169	12
Miscellaneous:	
I. T. 2572, X-1 Cumulative Bulletin 200	18
G. C. M. 2405, VI-2 Cumulative Bulletin 10	18
S. M. 5382, V-1 Cumulative Bulletin 8	18

Miscellaneous—Continued.
Treasury Regulations 65:
Art. 1504 as amended by T. D. 3748, IV-2 Cumulative Bulletin 7 ..... Page 11
Treasury Regulations 69:
Art. 1504 11
Treasury Regulations 74:
Art. 1312 23
Art. 1314 24
Treasury Regulations 77:
Art. 1312 24
Art. 1314 24
Treasury Regulations 86:
Art. 801-2 25
Art. 801-3 26
Treasury Regulations 94:
Art. 1001-2 28
Art. 1001-3 28

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC TRUST COMPANY, FORMERLY NAMED CENTRAL REPUBLIC BANK AND TRUST COMPANY, AS SUCCESSOR TRUSTEE BY CONSOLIDATION, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 36–38) is unreported. The Circuit Court of Appeals reversed the decision of the Board without written opinion. (R. 53.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 18, 1936. (R. 53.) Petition for a writ of certiorari was filed February 18, 1937, and was granted March 29, 1937. (R. 55.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trust in question is an "association" within the meaning of Section 701 (a) (2) of the Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved, together with subsequent changes in the regulations, are set out in the Appendix, *infra*, pp. 23–31.

STATEMENT

The following facts are taken from the Board's memorandum opinion (R. 36–38), and from the trust instrument and the agreement attached thereto (R. 13–36):

On December 12, 1925, Minerva S. Melidones was the owner of certain undeveloped real estate and on that date, for the purpose of subdividing and selling the same, she entered into two written agreements affecting the property. One of the agreements, designated "Declaration of Trust", provided for the placing of title in the Chicago

Trust Company (predecessor of Central Republic Trust Company) as trustee for the ultimate use and benefit of Minerva S. Melidones and A. A. Lewis, both of whom signed the trust instrument as beneficiaries of the trust. (R. 13, 17, 36.)

The pertinent provisions of the trust instrument may be summarized as follows: That the trustee will hold the property and the proceeds, profits and avails thereof for the use and benefit of the beneficiaries. That it is agreed among the parties and by any persons who may become entitled to any interest under the trust that the interests of the beneficiaries shall consist solely of a power of direction to deal with the title to the property and the right to receive the proceeds from rentals or from sales; that such right in the avails of the property shall be deemed to be personal property and may be assigned and transferred as such; that it was the intention of the parties to vest full legal and equitable title in the trustee; that the trustee is sole owner of the property, and so far as the public is concerned has full power to deal with it, but that it is understood and agreed by the parties and any persons who may hereafter become parties to the agreement that the trustee in dealing with the title to the property will follow the directions of the trust manager or such persons as may be beneficiaries at the time; that transferable certificates evidencing the interests of the beneficiaries may be issued by the trustee, and that thereafter valid as-

signments of beneficial interests may only be had by surrender of old certificates of interest to the trustee and issuance of new certificates in exchange by the trustee; that the beneficiaries shall have the management and control of the property; and that if any property remains in the trust twenty years from date it shall be sold at public sale by the trustee and the proceeds divided among those entitled thereto under the trust agreement. (R. 13–17.)

Under an agreement which was attached to the trust instrument and which was executed by Minerva S. Melidones, A. A. Lewis and the trustee, Lewis was appointed "manager of the trust" and was granted "such powers and duties in connection with the administration of said trust as may be necessary to facilitate the sale of said land." (R. 22–23.) The agreement was made irrevocable for a defined period (R. 22), and Lewis was given a specific interest in all sales contracts (R. 32). Among the powers specifically delegated were the following: To exercise management and control of the trust property for the purpose of selling it; to employ a sales organization; to select and approve purchasers for the lots, both as to character and financial responsibility, and to enter into contracts with the purchasers in the name of the trust as "manager" of said trust; to request the trustee to execute deeds and other necessary instruments. The trustee agreed to convey title to purchasers of lots upon the written direction of Lewis. (R. 17–36, 37.)

The agreement provided that it should not be construed as creating a partnership and that it should not be placed of record. (R. 33.)

The Commissioner of Internal Revenue classified the trust as an association and determined a deficiency of $512.30 for the year 1931. The Board of Tax Appeals held that the trust was not an association within the meaning of Section 701 (a) (2) of the Revenue Act of 1928. (R. 36–38.) This action was reversed by the Circuit Court of Appeals, on the authority of *Morrissey* v. *Commissioner,* 296 U. S. 344, which had been decided subsequent to the decision of the Board of Tax Appeals. (R. 53.)

SUMMARY OF ARGUMENT

I. The trust is taxable as an association since it is engaged in carrying on a business enterprise, and possesses the requisite attributes: title vested in the trustee, centralized management, continuity of existence despite death or change in beneficial ownership, and limited liability.

Reservation of control in the beneficiaries, if here effected, does not make the trust any the less an association.

II. The trust is an association despite the fact that there is technically but one trustee. The trust here has more than one beneficiary. But, assuming that it only has one, the trust is nonetheless an association.

ARGUMENT

I

THE TRUST MEETS ALL THE ESSENTIAL TESTS OF AN ASSOCIATION LAID DOWN IN THE RECENT DECISIONS OF THIS COURT

The sole question presented herein is whether the trust in question is an "association" within the meaning of Section 701 (a) (2) of the Revenue Act of 1928, *infra*, and hence is to be taxed as a corporation. That section defines a corporation as including "associations, joint-stock companies, and insurance companies", but the term "association" is not defined.

The problem of determining whether a trust is an association within the meaning of the taxing statutes has been a recurring one since the enactment of the Revenue Act of 1913. The question first came before this Court in *Crocker* v. *Malley*, 249 U. S. 223. That case involved a so-called "Massachusetts Trust" and arose under the Revenue Act of 1913, which imposed a tax upon the net income of "every corporation, joint-stock company or association", and the Court concluded that the trust was a pure trust and not an association, because the beneficiaries had no control. Later, the same trust agreement, with modifications, as was involved in the *Crocker* case was before the Court in *Hecht* v. *Malley*, 265 U. S. 144. That case involved taxes levied under the Revenue Act of 1918, where the term "corporation", as under the Revenue Act of 1928, was defined as including "as-

sociations, joint-stock companies, and insurance companies", and this Court held that regardless of control by the beneficiaries a trust was taxable as an association if the trustees were "associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises" (p. 161).

After the decision in the *Hecht* case, numerous cases were brought before the Board and the courts, but few of the decisions could be reconciled. In order to resolve the conflict, this Court, on May 13, and October 14, 1935, granted certiorari in four cases, namely: *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369; *Helvering* v. *Combs,* 296 U. S. 365; and *Swanson* v. *Commissioner,* 296 U. S. 362.[1] In the *Morrissey* case the Court analyzed with great care the historical background of the provisions of the Acts levying taxes upon associations and the regulations interpreting the same, reviewed previous decisions, and enunciated the rule that a trust is an association, taxable as a corporation, if—

1. It is created and maintained for the purpose of carrying on a business enterprise, and possesses the following attributes:

2. Title of the trust property vested in the trustee;

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[1] These cases, all in 296 U. S., will be hereinafter referred to by name without citation but with reference to any particular page.

3. Centralized management;

4. Continuity of existence without termination or interruption by death or changes in the ownership of beneficial interests;

5. Limited liability of the participants.

The trust here involved was engaged in a business enterprise, and the agreement of the parties forming the trust provided for the essential requisites of an association as set forth in the *Morrissey* case.

1. *The Business Enterprise*

The declaration of trust, and the contemporaneous agreement by Melidones (the former owner of the property), Lewis (the real estate operator), and the trustee, provided for the selling of real estate, by the familiar process of subdividing larger parcels. There can be no question that such dealing in real estate constitutes a business enterprise. *Morrissey* v. *Commissioner; Helvering* v. *Coleman-Gilbert Associates; Swanson* v. *Commissioner.* At the outset the trustee took title to at least four designated parcels, and was to take title to any other properties which might come into its hands by direction of the beneficiary, or beneficiaries. (R. 13, 17–19, 35.) The business of selling real estate lots from subdivisions was actively carried on. (R. 9, 11.) It can make no difference that the trustee, so far as the record indicates, did not take title to additional properties. *Swanson* v. *Commissioner,* at p. 365. Nor is it material that

the business here in question may have been a comparatively small one. As this Court said in the *Combs* case, where the parties had confined their operations to one oil well, "Parties may form an association for a small business as well as for a large one." *Helvering* v. *Combs,* at p. 368.

The petitioners admit, as they must, that the subdividing and selling of lots constitutes a business, but contend that Melidones was engaged in that business and not the trustee. (Pet. Brief, pp. 8–9.) They argue that the trustee was bound to follow the directions of such persons as might be beneficiaries, and had no discretion. This overlooks the clear and specific provisions that the trustee was to have full legal and equitable title to the real estate, the beneficiaries' interests in the proceeds from rentals or sales to be personalty (R. 14); and that the trustee was the "sole owner of the real estate", and, so far as the public was concerned, had "full power to deal with it" (R. 15).

But, in any event, if the parties could provide that the trustee hold all power publicly, and little power privately, and if for purposes of taxation only the private power can be considered, the most that can be said for petitioners' case is that the trustee in connection with the beneficiaries, Lewis and Melidones, was engaged in the business here involved. If the public powers of the trustee are not considered controlling, the declaration of trust and the agreement entered into in connection therewith provided for the carrying on of the business

by the trustee, in connection with the beneficiaries. The beneficiaries under the declaration of trust were to have the "management and control" of the property, and "the selling, renting and handling thereof." (R. 15.) And it was provided that the trustee was to deal with the property on instructions from the beneficiaries (R. 15). In accordance with such instructions the trustee was to make contracts of sales, conveyances, or otherwise deal with the title of the real estate (R. 15). Aside from such instructions, the trustee was to make collections from buyers, and distributions to beneficiaries, was to keep the books and records of the business and any other necessary data, and might issue certificates of beneficial interests and handle their transfer. (R. 14, 32–33.) It was contemplated also that the trustee, properly reimbursed, would defend suits for breach of contract, injury to person or property, and fines and penalties, and pay taxes, assessments, and insurance. (R. 14–16.)

Thus the trustee, under the control of the beneficiaries, was engaged in connection with the beneficiaries in the carrying on of the business.[2]

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[2] As this Court noted in *Hecht* v. *Malley*, 265 U. S. 144, 160, the language used *arguendo* in *Crocker* v. *Malley*, 249 U. S. 223, to the effect that there was no ground there for grouping together the beneficiaries and trustees in order to turn them into an association,

> is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the income and its distribution among the beneficiaries, and

Article 1314 of Regulations 74, *infra*, p. 24, which were applicable during the year here in question, provides in distinguishing a trust from an association, that a trust exists "where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or *in connection with the beneficiaries*, in the carrying on of any business, *and the beneficiaries have no control over the trust.*" (Italics ours.) The regulation further provides that an association exists if "the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise." Leaving aside the fact that there is only one trustee named in the declaration of trust, the effect of which fact is discussed *infra*, pp. 17–19, the trust here in question is an association within the plain meaning of Article 1314, for, first, the trustee carried on a business either by himself or in connection with the beneficiaries, and secondly, the beneficiaries controlled the trust. The particular provisions of the regulations here relied on remained substantially the same from 1925 until 1933. Regulations 65, Art. 1504, as amended by T. D. 3748, IV–2, Cumulative Bulletin 7; Regulations 69, Art. 1504; Regula-

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were not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 190. And see *Smith* v. *Anderson*, L. R., 15 Ch. Div. 247.

tions 74, Art. 1314, *infra*, p. 24. Meanwhile Congress had persuasively indicated its approval of the provisions by reenacting without change the general provisions as to associations in the Revenue Acts of 1926 (44 Stat. 9), 1928 (45 Stat. 878), and 1932 (47 Stat. 289). *Morrissey* v. *Commissioner*, at p. 355.

2, 3. *Title to the Property Was Vested in the Trustee. Centralized Management Was Obtained*

There can be no question that title to the real estate was vested in the trustee. The trust instrument provides that it is the intention of the parties to vest full legal and equitable title to the property in the trustee (R. 14). The provision indicates the intention to create more than a mere naked trust, where the trustee has only legal title with equitable title in the beneficiaries. The further provision (R. 14) that the interests of the beneficiaries should be deemed personal property and in case of death should pass to their executors or administrators and not to their heirs at law negatives the presence of any interest of the beneficiaries in the property itself. Finally, the declaration of trust conclusively states (R. 14):

> that no beneficiary now has, and that no beneficiary hereunder at any time shall have, any right, title or interest in or to any portion of said real estate as such, but only an interest in the proceeds as aforesaid.

Centralized management was obtained by transferring the property to a trustee and appointing

Lewis the manager of the trust. By agreement among Lewis, Melidones, and the trustee, Lewis, designated as manager of the trust (R. 22), was given the power to exercise management and control of the trust property for the purpose of selling it (R. 23). The trustee, holding full title to the property, agreed to follow the directions of Lewis in the disposition of the property. (R. 15, 22, 24, 27–28.) Lewis thus directed the business enterprise which was carried on by both Lewis and the trustee. In this there is a similarity to the *Swanson* case, where the renting of apartments, the details of management, and the distribution of net income were committed to a firm engaged in the business of buying and selling real estate and managing properties.

Petitioners do not deny the centralization of management but argue that the centralization accomplished no more than Melidones would have done as simple owner. (Pet. Brief, p. 12.) Even if that were true, the fact remains that the trust arrangement achieved centralized management. In the *Coleman-Gilbert* case where co-owners of real estate declared themselves trustees and beneficiaries of a trust to operate apartment houses on the property, it was held that an association existed despite a specific finding that the co-owners as trustees conducted the business in the same manner as it had been conducted by the co-owners before the trust was formed. *Helvering* v. *Coleman-Gilbert*, at p. 373.

4. *The Trust Had Continuity of Existence without Termination or Interruption by Death or Changes in the Ownership of Beneficial Interests*

The declaration of trust made full and careful provision for continuation of the trust business for twenty years (R. 16) despite changes in the ownership of beneficial interests by death or transfer. It was specifically stated that the interest of any beneficiary in the proceeds from rentals or sales of the subdivisions should be personal property, transferable and assignable as such, and should pass upon death of a beneficiary to his executor or administrator and not to his heirs at law. The agreement among the trustee, Lewis, and Melidones was not to be construed as creating a partnership (R. 33). The trustee was empowered to issue certificates evidencing the interests of the beneficiaries, and thereafter beneficial interests were in effect to be transferred only on the books of the trustee (R. 14).

By means of these provisions the trust business continued without interruption, although meanwhile the interest of Melidones was first assigned to one Benjamin Schwartz, and then passed to his estate (R. 9). So too, presumably under the provisions of the agreement (R. 34), the business of the trust was not interrupted when the present trustee, Central Republic Trust Company, succeeded the former trustee, Chicago Trust Company (R. 4, 9).

5. *The Agreements Provided for the Limited Liability of Participants*

The parties to the agreements sought to avoid liability as partners by specific provision (R. 33) that their trust arrangement for the carrying on of the business of selling lots should not be construed as creating a partnership. The declaration of trust vests full legal and equitable title to the real estate in the trustee who, to use the words of the declaration, "so far as the public is concerned, has full power to deal with it." (R. 15.) Both the declaration of trust and the agreement made in connection with the declaration of trust which set forth in detail the control of the beneficiaries and the consequent limitations upon the full power of the trustee were not to be placed of record. (R. 15, 33.) It was contemplated that the trustee, as full owner, might become liable personally or as trustee for breaches of contract, injury to person or property, and for payment of taxes, fines or penalties. In such event the agreement provides for reimbursement out of the trust fund or by the beneficiaries to the trustee for expenses and liabilities incurred. (R. 14–16.) But the participants nowhere provided for their liability to the public, other than to agree to respect the rights of purchasers (R. 27).

Ordinarily the limitation of personal liability of participants would be inherent in the use of the trust for carrying on a business. *Morrissey* v. *Commissioner,* at p. 359; *Helvering* v. *Combs,* at p.

368. It may possibly be that because of the control over the trust, attempted to be reserved by the beneficiaries, they would be held to be personally liable in some States. But the purpose of the parties is to be drawn from their agreements (*Morrissey* v. *Commissioner,* at p. 361; *Helvering* v. *Coleman-Gilbert,* at pp. 373–374) and the agreements sought to avoid liability as partners, and to immunize the personal fortunes of the participants. In any event, the question of whether under local law the participants are individually liable is not determinative. See *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110.

The petitioners are not aided by the presence of control in the beneficiaries. They argue that this Court has found only "Massachusetts or business trusts" to be associations, and that the trust here is not a trust of that type because the beneficiaries had large powers over the trust. Assuming, *arguendo,* that the beneficiaries had large powers over the trust (see pp. 9–10, *supra*), the presence of such fact would make all the more clear the existence here of an association. As already pointed out, *supra,* p. 11, the regulations from 1925 until 1933 provided that a trust carrying on business is an association if the beneficiaries reserved positive control over the trust. Cf. the subsequent regulations, Regulations 77, Art. 1314, *infra,* p. 24; Regulations 86, Art. 801–3, *infra,* p. 26; Regulations 94, Art. 1001–3, *infra,* p. 28. Further, in *Hecht* v. *Malley, supra,* this Court held the Hecht and Hay-

market trusts there involved to be associations although in those trusts there was present a very large measure of control in the beneficiaries. See *Morrissey* v. *Commissioner*, at p. 352. Indeed as the discussion in the opinion in the *Morrissey* case points out, there was once some question whether a trust could be taxed as an association *where the beneficiaries reserved no control* (Cf. *Crocker* v. *Malley, supra*), but it is an entirely novel and untenable position under the statute, the applicable regulations, and the decisions of this Court to contend that a trust is not an association *because the beneficiaries reserved control.*

The law has never been, and it is respectfully submitted cannot be, that parties forming a trust to secure the inherent advantages of centralization of management, continuity of existence, and limited liability in carrying on a business can avoid taxation as an association by the mere process of reserving a further advantage—the right to direct the enterprise.

II

THE TRUST CANNOT ESCAPE TAXATION AS AN ASSOCIATION ON THE GROUND THAT THERE IS BUT ONE TRUSTEE AND ONE BENEFICIARY

We have shown that the trust is engaged in business, and that it has the essential attributes making it an association within the *Morrissey* case. Petitioners nevertheless argue that there can be no association where there is but one trustee and one beneficiary, which they contend is the situation in the case at bar.

Here there was one trustee in whom title to the real estate was vested. But there was also the manager of the trust, Lewis, who directed the administration of the business. The situation is not substantially dissimilar from that of plural trustees, with some, or one, more active in the business than the others. Cf. *Helvering* v. *Coleman-Gilbert Associates.*

Article 1314 of Regulation 74, *infra,* p. 24, does not appear to cover the case of a single trustee. Under later clarifying regulations, it is immaterial whether the property of the trust is conveyed to a single trustee or to several. Regulations 86, Art. 801–3, *infra,* p. 26; Regulations 94, Art. 1001–3, *infra,* p. 28; and see Section 704 (b) of the Revenue Act of 1928, 45 Stat. 880. Where the essential requisites of an association are present, Treasury rulings have held trusts to be associations despite the fact of but one trustee, especially where, as here, the trustee carried on the business in connection with the beneficiaries. See I. T. 2572, X–1 Cumulative Bulletin 200; G. C. M. 2405, VI–2 Cumulative Bulletin 10; S. M. 5382, V–1 Cumulative Bulletin 8. See also *Trust No. 5833, Security First Nat'l Bank* v. *Welch,* 54 F. (2d) 323 (C. C. A. 9th), certiorari denied, 286 U. S. 544. Groups doing a reciprocal or similar insurance business through an attorney-in-fact present an analogy to the case of a single trustee. These groups have been held to be associations. *Harris* v. *United States,* 51 F. (2d) 382 (S. D. Tex.). See also *Pickering* v. *Alyea-Nichols Co.,* 21 F. (2d) 501 (C. C. A. 7th), certiorari denied, 276 U. S. 617.

The essential attributes of an association—the carrying on of a business enterprise by means of a trust with the consequent corporate advantages of centralization of management, continuity of existence, and limited liability—are present in the trust here in question. In assimilating associations to corporations and not to individuals, Congress must be considered to have found its justification in the substantial resemblances between corporations and associations, and not to have made a distinction on what is more a matter of form than substance—the difference between a combination of one trustee and "trust manager" on the one hand and two trustees on the other. *Morrissey* v. *Commissioner.* The corporate advantages secured in the carrying on of the trust business are the same in either situation. See *Ittleson* v. *Anderson,* 67 F. (2d) 323, 325 (C. C. A. 2d) in which case the court said:

> Usually there are a number of trustees and of beneficiaries in a business trust, but there is no reason to say that every business trust must have more than one trustee and more than one beneficiary at all times.

It is argued that there is but one beneficiary to the trust. But the declaration of trust is explicit on this point and states that the trustee takes title to the real estate "for the ultimate use and benefit" of Melidones and Lewis (R. 13). The agreement made in connection with the declaration of trust also specifically treats both Lewis and Melidones as beneficiaries (R. 34). It may be true that the

interests of Lewis and Melidones in the proceeds of the business are different. But a corporation does not cease to pay taxes as a corporation because it has various classes of interests in the profits. Melidones contributed capital to the enterprise. Lewis contributed services—his managing and selling activities. The profits of the trust business arose no more from one than the other, but from the combination of both in association with the administration of the trustee so far as the public was concerned. An association may be small in numbers. *Swanson* v. *Commissioner*. *Helvering* v. *Coleman-Gilbert*, at p. 372.

But assuming what is not the fact, that there is but one beneficiary, the trust is nonetheless taxable as an association. The agreements of the parties contemplated that others might join in the enterprise. (R. 13, 14, 15.) In that event, the provision for transfer of certificates could be availed of. (R. 14.) New properties could be added to the trust. (R. 13.) The nature and purpose of the enterprise are to be gathered from the agreements of the parties. The enterprise here is within the description of this Court in the *Morrissey* case (p. 357):

> * * * But the nature and purpose of the cooperative undertaking will differentiate it from an ordinary trust. In what are called "business trusts" the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and

> sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; * * * where those who become beneficially interested, either by joining in the plan at the outset, *or by later participation* according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise. [Italics supplied.]

So here there might be later participation. Indeed the beneficial interest, which petitioners contend is the sole interest here, is presently held by the estate of Schwartz following an assignment from Melidones, the original owner, to Schwartz. Should this interest devolve into the hands of coowners (cf. *Helvering* v. *Coleman-Gilbert Associates*) or should others join in the enterprise, there would be several beneficiaries. But the nature, purpose, and scope of the enterprise would remain in substance the same. It is submitted that if the trust here would be an association then, it was one at its beginning and is one now.

Before concluding, one last point requires brief consideration. It is contended by petitioners that the purpose of setting up the trust was to secure the title of the real estate from vicissitudes in the hands of Melidones. But this contention, even if true, is the same as that present and of no avail in the *Swanson* case. *Swanson* v. *Commissioner,* at p. 363; see the Record in that case at p. 27. The par-

ties are not at liberty to narrow the purpose, scope, and nature of the enterprise as formally set forth in the instruments under which their activities were conducted. They may have wished to secure the title, but their purpose as declared in their agreements was much broader than that. Melidones, Lewis, and the trustee formed a combination to conduct the business of holding, improving, subdividing, and selling real estate. They made provision for centralized management, continuity of existence despite death or change in beneficial ownership, and for limited liability, and were not to become partners. See *Helvering* v. *Coleman-Gilbert,* at p. 374. The trust was engaged in a business enterprise and secured the main advantages of corporate activity.

CONCLUSION

It is respectfully submitted that the trust is taxable as an association. The decision of the Circuit Court of Appeals should be affirmed.

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APRIL 1937.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

> SEC. 701. DEFINITIONS.
>
> (a) When used in this Act—
>
> * * * * *
>
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C., Title 26, Sec. 1696.)
>
> * * * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 1312. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 701.

ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 701. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

We append the subsequent history of the above regulations for the convenience of the Court.

Article 1312 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, is the same as Article 1312 of Regulations 74. But Article 1314 of Treasury Regulations 77 was changed to read as follows:

ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the

trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. Where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but have similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

Articles 801–2 and 801–3 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, are as follows:

ART. 801–2. *Association.*—The term "association" is not used in the Act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within

the meaning of the Act, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

ART. 801-3. *Association distinguished from trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages.

If a trust is an undertaking or arrangement conducted for income or profit, the

capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer", the use of a "seal", the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws", the existence of "control" by the beneficia-

ries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

Article 1001–2 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, is the same as Article 801–2 of Regulations 86. But Article 1001–3 of Treasury Regulations 94 was changed to read as follows:

ART. 1001–3. *Association distinguished from trust.*—The term "trust," as used in

the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being sup-

plied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer", the use of a "seal", the

issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws", the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

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SUPREME COURT OF THE UNITED STATES.

No. 743.—October Term, 1936.

A. A. Lewis and Company, Main and Lincoln Avenue Subdivision, Trust No. 1523, et al., Petitioners, *vs.* Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 17, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

On January 3, 1934, the Commissioner of Internal Revenue assessed a deficiency of income taxes for the year 1931 against petitioners in the sum of $512.30. The Board of Tax Appeals, upon petition and after hearing, determined that there was no deficiency. Upon review, the court below, without opinion, reversed the decision of the Board of Tax Appeals.

The case involves the relations of petitioners under a declaration of trust and an agreement attached thereto. And the question for decision is whether the trust constitutes an association, to be taxed as a corporation, within the meaning of § 701 (a) (2) of the Revenue Act of 1928, which provides that, when used in the act, "The term 'corporation' includes associations, joint-stock companies, and insurance companies." The commissioner, whose action was affirmed by the lower court, ruled that upon the facts stated below there was a taxable "association" within the reach of this statutory provision. The Board of Tax Appeals held to the contrary.

Minerva S. Melidones, hereafter called the grantor, in 1925, in order to subdivide and sell a tract of land which she owned, made the declaration of trust here in question, placing the title in the predecessor of the Central Republic Trust Company, as trustee for the use and benefit of herself and A. A. Lewis, both of whom signed the instrument as beneficiaries. The trustee was given power to deal with the real estate so far as the public was concerned, but was to do so only in accordance with the agreement attached to the trust instrument. That agreement, bearing the same date as the declaration of trust, was executed by the grantor, Lewis and the

trustee. The grantor, by the agreement, appointed Lewis, an experienced real-estate operator, as exclusive selling agent and as "manager of the trust created by said deed in trust and trust agreement aforesaid"; and was given "such powers and duties in connection with the administration of the trust as may be necessary to facilitate the sale of the said land." He was authorized to exercise management and control of the property for the purposes of sale; at his own expense to employ a sales organization; to enter into contracts with purchasers as manager of the trust; and to request the trustee to execute deeds and other necessary intruments. Contracts were to be made, and title was to be conveyed by the trustee to purchasers, upon Lewis' written directions. He was to receive as sole compensation for his services commissions based upon the price for which the lots in the subdivision were sold. The trustee was to collect and distribute payments after the initial payment; but was to have nothing to do with the sales of lots or negotiations relating thereto.

The grantor subsequently assigned her beneficial interest in the trust to Benjamin Schwartz, to which his estate has succeeded as sole beneficiary. The trust instrument provides that transferrable certificates may be issued by the trustee; but none was ever issued.

If it were not for the declaration of trust, we should have here the simple case of an appointment by a land owner of an agent to subdivide the land and sell it, receiving as compensation for his services a fixed percentage of the payments made by the purchasers. It is quite evident that such an arrangement has no element of substance or method which would warrant its designation as an association under the statutory provision in question. Nor can we see that the intervention of a trustee to hold title, execute contracts and conveyances at the direction of the real-estate agent and make collections alters the situation.

The question recently has received full consideration in *Morrissey* v. *Commissioner*, 296 U. S. 344, and three other cases which immediately follow in the same volume.* The trust reviewed in the *Morrissey* case was essentially unlike that now under consideration. There, the trust was a medium for the carrying on of a business enterprise by the trustees and participation in the profits by numerous beneficiaries whose interests were represented by trans-

*Swanson v. Commissioner, 296 U. S. 362; Helvering v. Combs, 296 U. S. 365; Helvering v. Coleman-Gilbert, 296 U. S. 369.

ferrable share certificates, thus permitting the introduction of new participants without affecting the continuity of the plan. The certificates represented both preferred and common shares. We pointed out that the corporate analogy was evidenced by centralized control, continuity and limited liability, as well as by the issue of transferrable certificates; and we said (p. 356) that the word "association" implies associates. "It implies the entering into a joint enterprise, and, as the applicable [departmental] regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust—whether created by will, deed, or declaration—by which particular property is conveyed to a trustee or is to be held by the settlor, on specified trusts, for the benefit of named or described persons. Such beneficiaries do not ordinarily, and as mere *cestuis que trustent*, plan a common effort or enter into a combination for the conduct of a business enterprise."

The arrangement here answers the foregoing description of an ordinary trust—that is, it was created in virtue of a declaration by which a designated piece of real property was conveyed to the trustee on specified trusts, for the benefit of definitely named persons, one of whom was the grantor of the land and the other an agent of the grantor for the sole purpose of subdividing and selling the land. The agent was designated by name, and his powers definitely fixed in advance of their exercise. He possessed no authority beyond that expressly delegated by his principal. The trust was adopted merely as a convenient means of making effective the sales of the agent under the contract. The duties of the trustee were purely ministerial, with no power to control, direct, or participate in, the conduct of the selling enterprise contemplated by the contract. There is to be found in the operation of the business no essential characteristic of corporate control—nothing analogous to a board of directors or shareholders, no exemption from personal liability, no issue of transferrable certificates of interest. There is simply the common relation of principal and agent, coupled with the collateral incidents of an ordinary trust. We are not able to find in the situation an "association" within the meaning of the statute under consideration, because there are no associates and no feature "making [the trust] analogous to a corporate organization." 296 U. S. at p. 359.

Judgment reversed.